DOCUMENT RESUME

ED 047 403	EA 003 316

TITLE	A Litigation Packet for Title I of the Elementary and Secondary Education Act.
INSTITUTION	Harvard Univ., Cambridge, Mass. Center for Law and Education.; NAACP Legal Defense and Educational Fund, Inc., New York, N.Y.
PUB DATE	[70]
NOTE	95p.
AVAILABLE FRCM	Harvard Center for Law and Education, 24 Garden Street, Cambridge, Massachusetts 02138 (Nonprofit organizations, free; others, $10.00.)
EDRS PRICE	EDRS Price MF-$0.65 HC-$3.29
DESCRIPTORS	*Court Litigation, Educational Legislation, *Equalization Aid, *Expenditure Per Student, *Federal Aid, Legal Problems, *School Law

ABSTRACT

This packet, containing model papers and other information necessary for initiating Title I litigation, is designed to provide the basic tools for lawyers who may wish to bring a lawsuit in a Federal court to compel the expenditure of Title I funds in a lawful manner. The material includes (1) a general discussion of Title I issues; (2) a memorandum on standing, jurisdiction, and remedies; (3) a model complaint; (4) a discussion of the legal status of program guides; and (5) model interrogatories based on current litigation. (JF)

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
OFFICE OF EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL OFFICE OF EDUCATION POSITION OR POLICY.

ED047403

A Litigation Packet for
Title I of the Elementary
and Secondary Education Act

Harvard Center for Law and Education
and
NAACP Legal Defense and Education
Fund, Inc.

EA 003 316

TABLE OF CONTENTS

SECTION		PAGE
I.	GENERAL MEMORANDUM ON TITLE I LITIGATION ISSUES - Mark G. Yudof	I-1
II.	INFORMATION GATHERING AND ANALYSIS - Phyllis McClure	II-1
III.	MODEL COMPLAINT - Mark G. Yudof and Armand Derfner	III-1
IV.	MEMORANDUM ON STANDING AND JURISDICTION - Mark G. Yudof	IV-1
V.	COMPARABILITY REQUIREMENTS - Armand Derfner	V-1
VI.	COMMUNITY PARTICIPATION - Mark G. Yudof	VI-1
VII.	LEGAL STATUS OF PROGRAM GUIDES - James A. Bensfield	VII-1
VIII.	SAMPLE INTERROGATORIES - Mark G. Yudof	VIII-1
IX.	DESCRIPTION OF TITLE I VIOLATIONS IN BERNALILLO MUNICIPAL SCHOOL DISTRICT, SANDOVAL COUNTRY, NEW MEXICO - Mark G. Yudof	IX-1

Mark Yudof

GENERAL MEMORANDUM ON TITLE I

Title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C., Sec. 241] signified a revolutionary change in the role of federal government in American education.[1] For the first time, the federal government expressly took the responsibility for meeting the special educational needs of children from low-income families. In the 1968-69 school year, nearly two-thirds of all school districts and some nine million students in both public and private schools, participated in Title I programs which cost a total of $1.123 billion.[2] Unfortunately, however, there is mounting evidence that there is a massive failure to carry out the statutory mandate of Title I,[3] and there are few signs that responsible governmental authorities will act voluntarily to correct this failure. Under these circumstances, litigation appears to be the most viable approach to immediate reform, and indeed, such suits may highlight the inability of the present system of education to deliver adequate educational services to the poor.

This litigation packet is designed to provide the basic tools for lawyers who may wish to bring a suit in federal court to compel the expenditure of Title I funds in a lawful manner. While responsibility for the administration of Title I funds is divided among the U.S. Office of Education, state educational agencies, and local educational agencies, general accountability for the misuse of funds exists at all three levels, and all should be joined as defendants in litigation seeking the reformulation of administrative criteria, closer scrutiny of expenditures, and compliance with administrative and statutory standards.

Title I provides that the U.S. Commissioner of Education shall make lump sum payments to state educational agencies, who, in turn, shall approve and fund projects for educationally disadvantaged children proposed by local school districts. In their project application for Title I funds, the local educational agencies must set forth their plans in detail, including a budget, identification of target areas and plans for evaluation of the project. Money is available for a broad range of projects, but under the law, any project must be compensatory in character. Applications are not made to the Office of Education, but to the state department of education, which has the duty of ensuring that the projects, as planned and as implemented, conform to all applicable regulations. This state responsibility includes establishment of standards and procedures for accounting, provision for annual audits of state and local expenditures, investigation of complaints, and periodic evaluation of the effectiveness of local projects. [See, e.g., 45 C.F.R., Sec. 116.48]

The Office of Education, aside from having primary responsibility under the Act for promulgating regulations and guidelines, also must satisfy itself through periodic audits of state and local expenditures, that the law and regulations are being followed. Where violations are discovered, the Commissioner of Education may withhold funds, reject state applications or seek the return of the illegally used monies. [20 U.S.C., Sec. 241]

Purposes of Title I

In enacting a novel federal statute which imposed federal educational priorities upon existing state and local structures, Congress, not surprisingly, created a law with diverse, and, at times, inconsistent objectives. However, from a limited litigation perspective, the purposes of Title I may be accurately represented as those set forth in the declaration of policy which precedes the substantive provisions of the Act:

> In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance...to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children. [20 U.S.C., Sec. 241a]

In other words, while the Act was enacted in recognition of the special needs of low-income children and of districts with concentrations of such children, the purpose was to provide financial assistance to districts of high poverty concentration in order to meet the needs of all educationally deprived children. This means that a school district establishes its eligibility for Title I funds on the basis of the number of low-income children residing in the district, but that the programs financed by these grants are open to all students whose achievement levels fall below that "appropriate for children of their age," even if they are not poor. Congress apparently assumed a high correlation between educational failure and poverty, and, in order to attack this conjunction, designed the Act so that the greater the overlap in a school district of poor children and educationally disadvantaged children, the greater the federal expenditure per eligible child.

The Basic Aid Formula

The maximum amount which a local school district is eligible to receive is an amount equal to 50% of the average per pupil expenditure in the state* multiplied by the number of children, ages five to seventeen, whose families have an annual income of less than $2000, or whose families have an income in excess of $2000 due to payments from an approved aid to dependent children program, or who are "living in institutions for neglected or delinquent children." [20 U.S.C., Sec. 241d] The formula may be expressed by the following equation:

$$.50P\ (I+D+N) = E$$

Where:
P = Per Pupil Expenditure in the State
I = Number of Children in Families with less than $2000 in Income
D = Number of Children in Families receiving Aid to Dependent Children with Incomes in excess of $2000
N = Number of Neglected or Delinquent Children in Institutions
E = Maximum Entitlement of a Local School District

The allocation to which a state is entitled is the sum of the entitlements of the local school districts within a state, plus certain monies for state-operated institutions for the handicapped, delinquent, or neglected

*Or the national average if it is higher and for the education of migrant children. [20 U.S.C., Sec. 241d] While maximum entitlement is calculated according to the above formula, Congress has never appropriated a sum of money for Title I which even approaches the authorized level of expenditure of $2.7 billion.[4] Under these circumstances, the Act provides that the allocation to each local district should be "reduced ratably" such that each will receive the same proportionate share of its maximum entitlement. [20 U.S.C., Sec. 241h] Furthermore, Congress has inserted in recent Title I appropriation bills the proviso that no district may receive less than 92% of the amount of Title I payments it received the previous year.

Statutory Criteria for the Approval of Title I Applications

While the state educational authorities have the responsibility of approving or disapproving the local Title I project applications, the states must make their determinations on the basis of criteria established by the Act itself and such "basic criteria as the Commissioner may establish." [20 U.S.C., Sec. 241e] There are eleven requirements for Title I projects stated in the Act itself. The most important are:

> *The projects must be "designed to meet the special educational needs of educationally deprived children in the school attendance areas having high concentrations of children from low-income families," and "of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting those needs..."

*The local educational agency must make provision for providing educationally deprived children in private schools, including parochial schools, with "special educational services and arrangements." However, the control of funds for private schools and the title to all property purchased with the funds must be in a public agency.

*In the case of applications for funds for planning, the planning must be directly related to Title I programs, and the funds must be needed because of the "innovative nature of the program" or "because the local educational agency lacks the resources necessary to plan adequately."

*Provision must be made for evaluating the effectiveness of the program in meeting the special educational needs of the eligible children.

*The local educational agency must make periodic reports and keep records which will enable the state educational agency to verify the reports and to fulfill its obligations to the Commissioner of Education.

*Procedures must be adopted for acquiring and disseminating information to teachers and administrators with regard to "promising educational practices" developed in the course of Title I projects. [20 U.S.C., Sec. 241e]

Administrative Criteria for the Approval of Title I Projects

While the statutory criteria embodied in Title I for the approval of projects are useful as broad articulations of federal policy, the politically sensitive task of drawing up concrete standards, which would relate federal priorities to the states and to local school districts, fell to the Commissioner of Education.[5] With few exceptions, the Commissioner responded to this responsibility by promulgating regulations and guidelines which appear to be consistent with the Act's compensatory character. Nonetheless, the application of these criteria is marked by a timidity, a lack of adherence to purposes, and a sloppiness which necessitates resort to the judicial process. There is mounting evidence that local and state educational agencies are approving projects which are unrelated to the needs of poor children, ignoring instances of non-compliance with guidelines and regulations, failing to conduct periodic audits which are necessary to monitor Title I expenditures, and keeping inadequate records of their activities; and that the Commissioner of Education has not pressed the states for compliance or employed the ultimate sanction of cutting off funds to states that do not comply substantially with the Act and the regulations.[6] In this regard, the findings of the HEW Audit Agency in its report on Indiana are typical:

> Our examination disclosed that the State Agency did not exercise adequate control over funds of approximately $33.7 million made available to local educational and other agencies. As a result, there is no assurance that the funds were expended for the purposes intended by Title I of the ESEA. The local agencies did not maintain documentation to support expenditures purportedly incurred for approved project purposes nor submit meaningful reports needed by the State agency for fund management purposes. We found no evidence that the State Agency enforced compliance with requirements pertaining to submission of accurate reports on a timely basis or for maintaining and submitting adequate documentation. Financial Reports submitted to the State Agency and which we reviewed disclosed conditions that should have alerted it to the need for immediate corrective action. Instead, the conditions noted by us for fiscal year 1966 were continued during fiscal year 1967. Furthermore, in the absence of evidence that the funds were expended for purposes intended by Title I of ESEA, there is no assurance that the Federal funds were not used to supplant rather than supplement those of the State and local agencies.[7]

The remaining portions of this essay will focus on four of the most significant administrative criteria for the distribution of Title I funds: the requirement that federal funds supplement and not supplant local funds; the requirement that funds be concentrated on a limited number of eligible pupils; the requirement that funds be concentrated on target areas with high concentrations of low-income children; and the requirement that Title I funds be used for school construction and equipment purchases within narrowly defined limits.

1. Supplement, Not Supplant:

The most important criterion which the Commissioner of Education promulgated for Title I projects, and the criterion upon which most suits should focus, is the requirement that federal appropriations supplement existing state and local expenditures for education, and that the federal funds not be used as a substitute for local funds in order to provide services which would or should be provided without federal assistance. In other words, federal payments must be additive, and purchase educational services for the underprivileged which are not available to the local school population at large. These principles are embodied in a guideline which, although hardly a model of clarity,[8] is crucial to the achievement of the Acts' purposes:

> The instructional and ancillary services provided with State and local funds for children in the project areas should be comparable to those provided for children in the non-project areas, particularly with respect to class size, special services, and the number and variety of personnel. Title I funds, therefore, are not to be used to supplant state and local funds which are already being expended in the project areas or which would be expended in those areas if the services in those areas were comparable to those for non-project areas. This means that services that are already available or will be made available for children in the non-project areas should be provided on an equal basis in the project areas with State and local funds rather than with Title I funds.[9]

While there is a paucity of data on the distribution of Title I funds within school districts, and even less data on the level of services provided in non-Title I schools, the fragmentary information available indicates that school administrators are ignoring the requirement that federal funds not be spent in place of local and state funds.[10] Title I funds are being used for construction, teacher salaries, libraries, and other programs and facilities which the school district would normally purchase with local and state funds.[11] In many areas, particularly the South, Title I payments are being used to provide poor schools with high concentrations of economically underprivileged Negro students with facilities and services which the local educational agency has already provided the white schools in the district.[12] In other areas, particularly in the large cities, local school boards have made little effort to equalize per pupil instructional costs between target and non-target schools; teachers in target schools are less qualified, less experienced, and, most importantly, lower paid. State officials apparently make no effort to determine whether a district is providing equal levels of educational services in Title I and non-Title I schools.[13] Thus, from present indications, at the most vital point in the administration of Title I, at the point where the federally established interest in compensatory education must be superimposed on local priorities, local, state and federal officials have disregarded the law. Aside from the vindication of the federal interest, compelling compliance with the supplement-supplant requirement would provide a means of attacking intra-district discriminations against the poor in the allocation of educational resources, a result with implications far beyond the parameters of the Act itself.

2. Concentration of Funds Per Child

The regulations and guidelines provide that Title I resources must be concentrated "on those children who are most in need of assistance", and that "decisions should be made in terms of the effectiveness of providing comprehensive services to a limited number of children in a few groups as opposed to the ineffectiveness of spreading diluted services over all eligible children in all groups."[14] Thus:

The greater the concentration of effort, as indicated by investment

> per child, the greater the likelihood that the program will have a significant impact on the children in the program. The investment per child on an annual basis for a program of compensatory educational services which supplement the child's regular school activities should be expected to equal about one-half the expenditures per child from state and local funds for the applicant's regular school program.[15]

These requirements apparently are being widely disregarded. Responding to political pressures and a desire to help as many children as possible, school administrators have spread Title I funds over large groups of eligible children.[16] In some instances projects have been designed to meet the needs of the student body or school district at large, including ineligible children who are not educationally deprived.[17] As a result, in 1966-67 the average per participating pupil expenditure of Title I funds was $99, a sum which the Council on the Education of Disadvantaged Children characterized as "hardly enough to make a significant difference."[18]

> In consequence, while the young beneficiaries might have a hot lunch for the first time, all their other handicaps go untouched, and Title I funds -- while spent for entirely worthy purposes -- have simply failed to achieve the overall purpose of the legislation.[19]

The per pupil concentration requirements which the Commissioner has promulgated are essential to the achievement of the compensatory purposes of the Act. The problems, once again, are those of enforcement and compliance.

3. Concentration of Funds on Target Areas:

Section 105(a)(1) of Title I provides that projects must be "designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low income families." [20 U.S.C., Sec. 241e] The U.S. Office of Education has interpreted this section to mean that the targets for Title I programs must be school attendance areas in which the percentage of low income children is as high or higher than the percentage of low income children in the school district as a whole.[20] In turn, school attendance areas have been interpreted, more out of administrative convenience than statutory compulsion, as being schools, and thus, Title I efforts have focused on concentrations of eligible children in target schools -- thereby creating school-based programs.

The concentration requirements, in responding to the greater needs of poor children who attend schools where their peers are poor, and in explicitly recognizing the class and therefore racial segregation that characterizes American education, contribute to the continuance of such isolation. School systems and schools, in effect, are rewarded for remaining segregated. Conversely, it has been asserted that education for low income children in schools largely composed of poor children is more expensive than the education of the same children in predominantly middle class schools; poor children in low income schools may "need" more educational services than other poor children; and districts with high concentrations of children from low income families are likely to have a lower real estate tax base and thus to have less funds available for educational purposes.

In an effort to reconcile the competing values of integration and concentration the U.S. Office of Education promulgated the requirement that

Title I services follow an eligible child who is transferred from a target to a non-target school. The problem, once again, is non-enforcement. Whether from a bureaucratic desire to avoid the trauma of creating non-school based programs or from a discriminatory intent, local educational agencies have disregarded this requirement, and state educational agencies and the U.S. Office of Education have done nothing to alter this situation.

In districts that are under a compulsion to desegregate or that have done so voluntarily it seems likely that the schools will be integrated in fact, or they will be attended by black (or Indian, Puerto Rican, Mexican-American, etc.) students only as the white students drop out of the public school system. In either event, there will not be schools with concentrations of poor children which are higher than those in other schools in the district, since most of the poor children are black, and therefore, there will be no identifiable target schools. Under such circumstances, the requirement that Title I services follow the child is meaningless. Targets for Title I funds will have to be selected on a basis other than the relative concentration of children from low income families, and local educational agencies are apt to use this discretion to recreate segregation. In the most blatant instances, the use of Title I funds to further resegregation may be attacked under the court decree mandating integration. For example, in Alachua County, Florida, a previously black school was converted into a "Title I Center" and poor black children were bused from other neighborhood-based schools to this

Center. Elsewhere, Title I funds have been employed to equip all-white private academies.

In many instances local educational agencies that are under a compulsion to integrate their schools have resorted to somewhat more subtle devices to perpetuate segregation. Under the guise of educational expertise, local boards have established segregated tracks within schools, ostensibly to permit the concentration of compensatory educational services, but in reality to recreate racial isolation. In this situation, local educational agencies must be compelled to administer Title I programs in a reasonable and non-discriminatory fashion which is consistent with the educational imperative of providing supplemental educational services to poor children. In effect, this means that Title I services must be fashioned in such a manner that they are minimally restrictive of the right of minority children to attend integrated classes. For example, flexible tracking, where grouping is done on a subject basis, may be permissible whereas totally segregated tracks, with complete separation of the races, may be impermissible. After school remedial reading classes or tutorials also may be permissible. In other words, given a choice between a desirable Title I service that perpetuates segregation and one that does not, local boards must choose the service that least interferes with integration. A contrary approach would violate Title I regulations, Title VI of the Civil Rights Act of 1964, the 14th Amendment, and, quite likely, the very order under which the district was desegregated.

Wholly apart from consideration of the impact of concentration on integration, many local educational agencies are not targeting Title I funds to the schools in the district that have average concentrations of poor children that are higher than the average of such children for the district as a whole. For example, in the Bernalillo School District in New Mexico, five of the seven schools in the district qualified for Title I programs even though only two schools had higher than average concentrations of low income children. Again, in Easton, Pennsylvania, the district-wide average percentage of poor school children was 12%, and only four of the ten target schools exceeded this average percentage (indeed, the average percentage of poor children in the target schools was less than 12%).* Furthermore, even where the targeting appears to conform with the regulations, in some instances discriminatory means of identifying poor children are employed. For example, reliance on Aid For Dependent Children statistics may discriminate against poor Mexican-American children, whose families, for whatever cultural or political reason, are less likely to receive such welfare payments than other minority groups.

4. Construction Projects and Equipment Purchases

The Commissioner of Education has determined that Title I programs should be conducted in existing facilities wherever possible since the construction of new school facilities is deemed to be the responsibility of the local school districts. Nonetheless, in instances of extreme need, Title I funds may "be used for construction...[in order to] meet the highest priority needs of educationally deprived children..."[21]

---

*See Easton, Pennsylvania, Title I Project Application 1969-1970.

Furthermore, purchases of equipment are limited "to the minimum required to implement approved Title I activities or services."[22] Evidently, this emphasis on operational expenditures is a corollary to the per pupil concentration; its thrust is to prevent local districts from stocking inventories for school-wide or district-wide use. On the basis of the available data, there are clear indications that the local educational agencies are failing to comply with the equipment and construction restrictions.[23] Much of the expenditures in this area are straightforward supplanting of local funds. In some instances, Title I funds are used for construction, mobiles, and renovations which perpetuate segregation. In part these violations may stem from the ambiguity of the regulations and guidelines, but again, staunch federal and state enforcement is lacking.

FOOTNOTES

1. See, e.g. Meranto, *The Politics of Federal Aid to Education in 1965: A Study in Political Innovation*, 1967; Tiedt, *The Role of the Federal Government in Education*, 1966.

2. The National Advisory Council on the Education of Disadvantaged Children, Fourth Annual Report: *Title I-ESEA: A Review and A Forward Look*, 1967, pp. 1, 10-11 [Hereinafter cited as Fourth Annual Report].

3. Report by Ruby Martin of the Washington Research Project of the Southern Center for Studies in Public Policy and Phyllis McClure of the NAACP Legal Defense and Education Fund, Inc., *Title I of ESEA: Is It Helping Poor Children?*, 1969. [Hereinafter cited as Title I Study].

4. Fourth Annual Report, pp. 10-11. See generally Bailey and Mosher, *ESEA: The Office of Education Administers a Law*, 1968, p. 43, [Hereinafter cited as Bailey and Mosher].

5. See Bailey and Mosher at 109-119.

6. According to one study, instances of federal action against states for misuse of Title I funds are rare:

> Massachusetts returned $692 which had been spent on staff salaries prior to approval of local district's project. Wisconsin has returned $43,653 which represented salaries charged to Title I in Milwaukee when only a portion of staff time was spent on Title I activities. Two federal audits of Chicago, in which auditors recommended that the Office of Education seek recovery of approximately $1.2 million, are still being negotiated by State, local and Federal officials. The Office of Education, however, did ask and receive $249,642 from Chicago which represented interest earned on Title I funds deposited in the school system's bank account. With these exceptions there has been no federal action against State and local districts which have used Title I funds contrary to the law and regulations. (Title I Study, pp. 96-97).

7. HEW Audit Agency Report on Audit of Title I of the ESEA of 1965, State of Indiana (Emphasis added). See also, e.g., HEW Audits of Colorado, Georgia, Illinois, Louisiana.

8. "First Alcalde: "Might I know the point of all this rigamarole?"

> The Secretary: "It's intended to get them used to that touch of obscurity which gives all government regulations their peculiar charm and efficacy. The less these people understand, the better they'll behave."

(Camus, Albert, *State of Siege*)

9. ESEA Title I Program Guide Number 44, Guideline 7.1, March 18, 1968 (Emphasis added).

10. Title I Study; HEW Audit Agency Reports on Title I of the ESEA of 1965.

11. Title I Study, supra; See, e.g., HEW Audit Agency Reports of Mississippi, Wisconsin and Michigan.

12. Title I Study at 29-35; HEW Audit Agency Reports.

13. Ibid. at 29.

14. ESEA Title I Program Guide Number 44, Guideline 4.2, March 18, 1968.

15. ESEA Title I Program Guide Number 44, Guideline 4.7, March 18, 1968.

16. Fourth Annual Report at 14.

17. Title I Study, supra; HEW Audit Agency Reports. The following example is one of the more egregious instances of a violation of the per pupil concentration requirements:

> Our review of local agency equipment purchases disclosed that 23 Parish School Boards [in Louisiana] had "loaned" equipment costing $654,624 to schools that were ineligible to participate in the Title I program. We find no basis for an expenditure of funds for schools that do not meet the criteria established for eligibility under Title I. These funds are provided for special projects to help a specific group of underprivileged children and all expenditures must be for the purpose of accomplishing the stated goals of the approved project.
>
> Our site visits disclosed that some of this equipment was set in concrete or fastened to the plumbing. Much of the equipment had been at the ineligible school since its acquisition and in some instances was delivered by the vendor to the ineligible school. We believe that circumstances as noted above preclude any classification of equipment "on loan." We are recommending that the cost of the equipment "loaned" to ineligible schools be reimbursed to the Federal government on the basis that it is general aid and prohibited by the law and since its return to a central location would create an excessive surplus of unneeded materials. [HEW Audit Agency Report of Louisiana].

18. Fourth Annual Report, at 14-15. See also, Bureau of Compensatory Education Program Evaluation, California State Department of Education, "Evaluation of ESEA Title I Projects of California Schools -- Annual Report 1967-68, in which it is concluded that Title I projects spending less than $250 per child generally fail to affect achievement significantly.

19. Ibid.

20. ESEA Title I Program Guide Number 44, Guideline 1.1, March 18, 1968.

21. ESEA Title I Program Guide Number 44, Guideline 5.7, March 18, 1968.

22. ESEA Title I Program Guide Number 44, Guideline 5.6, March 18, 1968.

23. See, e.g. HEW Audit Agency Reports on Tennessee, Connecticut, Georgia, Michigan and Alabama; see generally Title I Study, Chap. IV.

Phyllis McClure

INFORMATION GATHERING AND ANALYSIS

Gathering and analyzing information about Title I expenditures is not difficult, but it is crucial to the development of your case. All of the information you need can be obtained from local school officials, and they are required by the Title I Regulations and by Program Guide #54 to provide all information concerning the Title I program to you or any other interested citizen.

The basic document which you should first obtain is the project application for the current school year. These project applications may take different forms depending on what state you are in, but they all contain the same essential information. A copy of what the Title I project application will resemble is attached to this paper. Along with this document, you should also obtain the budget and the narrative program description, plus any other written material produced by the school district such as pamphlets, evaluations, equipment inventories. With the exception of communications between state and local officials concerning Title I which you may be able to obtain from the state educational agency, the documents should tell you everything you want to know about how Title I operates in any local district. In order to have a complete picture of Title I and to build a good case, you should obtain all of this material for each previous school year in which Title I funds have come into your district.

You have two basic jobs in analyzing this information. The first is to determine where the money is going and what kinds of programs and services are being supported. The second is to determine if the school district is actually providing the services and programs to eligible children that they say they are in the project application. It is possible that the project application does not reflect what is actually happening with Title I funds, so it is wise not to take the project application at face value until you have verified the information in it by visits to schools and interviews with school officials. There are five basic steps to understanding how Title I funds are used in a local district:

1. In order to determine where the Title I money is going, you should begin with the budget and the figures provided in the Title I project application. Figure it out by category--instructional and non-instructional; administrative, clerical, instructional, cultural enrichment; health care and food service. How many personnel are paid by Title I funds? What equipment has been purchased? What construction, remodeling, or renting of mobile units is to be supported?

2. From the budget and descriptive narrative you should determine what programs and services are operating in each school. This may be set out in the description of programs, or the budget may indicate the assignment of teachers to schools. If you can get this school-by-school information, from the materials you have, list for each school the programs and services which Title I supports and then verify this information through interviews with teachers and principals, and conversations with children and parents. If this information is not provided, you will have to dig it out from interviewing the Title I coordinator for the local system, and from the principals and teachers.

3. The next thing to figure out is which schools and which students are receiving Title I assistance. The schools with the highest incidence of poverty in the district should be the targets, not all the schools

in the system. Furthermore, the local agency should distinguish between the enrollment figures for the Title I school and the actual number of participants in the Title I program. Many project applications simply list the entire school enrollment rather than identifying individual children who are educationally disadvantaged. All children, even in a Title I target school, may not qualify under the law as either meeting the poverty criteria or the standard of educational deprivation.

If all students in the target schools are participating, this may be an indication that Title I is being used as general aid. On the other hand it could well be that all children in the school or in the school district are eligible for assistance. The problem then is determining whether those children *most in need* or those with the most *severe* educational needs have been identified and assisted with Title I programs. By dividing the total amount of funds approved by the state in the upper right hand corner of the first page of the project application by the total number of participants you will arrive at an average per-pupil expenditure figure. This figure may vary from school to school, because some students may get a heavier concentration of services than other students. However, if the average figure is low--for example $50 or $60 per child--this may be another indication that Title I funds are being used as general aid.

Finally, it is important to bear in mind that not all children eligible under the law may receive assistance. Because Congress has never fully funded Title I, there simply is not enough money coming into each local district to serve all eligible children on a concentrated basis. The choice is between giving a little to everyone or all to some children who are most deprived.

Therefore, it is not possible to argue that a local district did not provide Title I benefits to some eligible children unless you can document that they are the most deprived in the terms of the meaning of the statute, regulations, and program criteria. Because some states and local districts are now beginning to concentrate Title I funds, some children who received Title I benefits in the past no longer get them. This causes great dissatisfaction in the community but cannot necessarily be attacked legally because school officials are only doing what they must or should have done several years ago.

4. Once you determine how Title I funds are being used in target schools and what kinds of programs and services Title I eligible children are provided, you will want to find out whether these same services and programs are provided to other children in the system with local, state or other kinds of Federal money. If, for example, Title I is supporting a remedial reading program or an experimental mathematics course, are those programs provided in other schools which are not receiving Title I assistance? The only way you can determine this is to visit other schools in the system and talk to principals, teachers, the PTA officials and similar persons who are familiar with that school. If you find the same programs or services, equipment or construction in non-Title I schools as in Title I schools, but paid out of different budgets, you probably have a case of using Title I funds to supplant state and local funds.

Another kind of supplanting occurs when the school district starts using Title I funds for services or programs in Title I schools which existed prior to the inception of Title I and which were paid for out of other funds. This is why it is important to obtain project proposals from previous years. For example, a nurse or curriculum coordinator may have been assigned to one or several Title I schools. She may have been in these schools for several years, but now her salary shows up in the Title I budget. Also such roving personnel assigned to more than one school may be serving Title I eligible children as well as non-Title I children, but that part of her salary is paid out of Title I funds. This is also a case of supplanting.

The most obvious examples of supplanting are using Title I money at eligible schools for the same items funded by local or state money at other schools and the prorating of costs or salaries between the Title I budget and the regular school budget.

5. General aid is perhaps the easiest violation of Title I to detect. If money is being used to support services and programs that reach ineligible children, then obviously eligible children are being cheated. One cannot be too dogmatic about general aid however, because there may be instances when to exclude ineligible children from participating in Title I services simply would not make good sense. For example, if Title I is supporting a reading clinic or a special excursion, other children in a class or in a school may receive incidental benefits without violating Title I.

One of the most obvious examples of general aid is the use of Title I funds to support an audio-visual center, a film library, a curriculum or materials center which is located in a central facility but used by all schools or at least by non-Title I schools in the district. In most of these centers, equipment is checked out by teachers or by individual schools. A visit to the center and an examination of the check-out cards should tell you where the equipment and materials are going. Such centers may be a very nice addition to the educational program, but if local school officials consider these services useful and appropriate for the general education program, then they ought to be funded out of other than Title I money.

Another frequent example of general aid is the use of Title I funds to support the salaries of personnel who perform general duties for the whole system or who perform duties in Title I and non-Title I schools.

There are other kinds of information you should have to obtain full insight into how Title I operates.

6. Is there a functioning Title I Advisory Committee or some other vehicle of parent and community involvement? This will require interviewing of school officials.

7. What involvement in the design of the Title I program has the local CAP agency had beyond simply signing off on the project application? What has the CAP agency's contact with the school system been? Has the CAP director ever considered refusing to sign off on the project application if his agency had not been involved?

8. Has the school district conducted any evaluations of the Title I program as required? Are these evaluations simply self-serving descriptions or do they make an honest attempt to evaluate whether kids are learning or whether the goals of the program are being met?

9. Are the goals of the Title I program clear and specific or doesn't the program have any goals at all? Or are the program goals stated in such vague and general terms as to be almost meaningless? Are the goals stated in terms of educational progress or are they stated in other terms such as improving discipline or achieving middle-class values? Are they based on racist implications or ideology? If definite and specific goals are stated, is the program funded by Title I directed at those goals in any way? You may need to consult educational experts or authorities on

this one, but quite often simple common sense will tell you whether the goals of the program is directed to meet any clear objectives at all.

10. Above all, is the Title I program designed to meet the most pressing and obvious educational needs of poor children? In a district in which poor and minority children are three years behind in reading, is Title I supporting remedial reading or is it supporting trips to an amusement park, an arts and crafts program and food service? In a district with poor children for whom Spanish is the native tongue, is Title I money being used to meet those language needs or are they being ignored? Does the language program give equal weight to Spanish as it does to English or is it simply an effort to subordinate and eradicate any Spanish language, tradition or culture?

11. How does the school lunch program operate in your district? Does the district participate in the National School Lunch Program? (You can find this out from local officials or from the state School Lunch director.) Under this program, are free and reduced-price lunches provided in poverty-area schools or does Title I support food service in those schools? Does Title I money pay the reduced price? In general you should be alert to the possibility that Title I funds may be used to support a lunch program where the National School Lunch Program, surplus commodities, and a little local effort could be used to support the school lunch program and thus free Title I for other uses.

12. It is also crucial to your investigation to determine how local school officials determine eligibility of children for Title I assistance. Are the poverty criteria employed to rank eligible schools clearly within the purview of section of Program Guide #44? How is educational

deprivation determined? Is there any attempt to determine educational deprivation or is it simply equated with poverty? What tests or other criteria are employed? If no attempt or a very unsophisticated attempt is made to determine educational deprivation, how can a Title I program be designed and conducted to deal with educational deprivation if the district doesn't understand the dimensions of the problem?

In finding answers to the questions raised in numbers 8,9,10, and 12 a careful reading of the narrative description on the program may be helpful. It is usual for school officials to include in this section their rational for the programs they are conducting, the goals they have identified, and whether there is a real effort to measure progress of students and thus validate the worth of their programs. Interviews should be conducted after the documents have been examined and when you think you have some notion of how the money is being spent.

Armand Derfner
Mark Yudof

MODEL COMPLAINT

1. The manner in which the State of ________ administers more than $______ in federal funds it receives annually under Title I of the Elementary and Secondary Education Act of 1965 [hereinafter "Title I"] violates and will continue to violate the Constitution of the United States, the laws of Congress, the regulations and guidelines of the United States Department of Health, Education and Welfare [hereinafter "HEW"] and the United States Office of Education [hereinafter "USOE"], and the contracts between HEW and USOE and the state and local educational agencies [hereinafter LEA'S] in the State of __________.

2. The Title I program in effect in the ________ Municipal School District is and has been administered in a manner that violates and will continue to violate the Constitution of the United States, the laws of Congress, the regulations and guidelines of HEW and USOE, and the contracts between HEW and USOE and the state and the ________ Municipal School District.

Jurisdiction

3. Jurisdiction for this complaint arises under 28 U.S.C. Sections, 1331, 1343(3), 1343(4), ______ and ______.

Parties

4. Adult plaintiffs ______, ______, ______, and _______ who sue on their own behalf and on behalf of their minor children are citizens and taxpayers of the United States and of the State of ______. The children plaintiffs are all educationally deprived children from low income families living

in school attendance areas with high concentrations of such children, and they are thereby among the intended beneficiaries, or "target" populations, for federal funds under Title I.

5. Each plaintiff sues on his own behalf and on behalf of all other educationally deprived children from low income families and their parents, who are similarly injured by the discriminations alleged herein. This is a proper class action under Rule 23(b)(2), Fed. R. Civ. P. The class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the named plaintiffs are typical of the claims of the class; and the named plaintiffs will fairly and adequately protect the interests of the class. In addition, the defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

6. Defendant Robert Finch is Secretary of HEW. Under 42 U.S.C., Sec. _____, he has overall responsibility for the activities of HEW and his subordinates in the Department, including the enforcement of section 601 of the Civil Rights Act of 1964, 42 U.S.C., Sec. 2000d, and under 20 U.S.C., Sec. 2, he has overall responsibility for the supervision of USOE. Pursuant to these responsibilities, he has from time to time promulgated, and has responsibility for enforcing, regulations governing the administration of Title I funds, 45 C.F.R., Part 116, and governing the civil

rights compliance of programs receiving federal financial assistance. 45 C.F.R. Part 80.

7. Defendant James Allen is Commissioner of USOE, and under 20 U.S.C., Sec. 2, has general authority for the activities of USOE and his subordinates in that office. Under 20 U.S.C., Sections 241a, et. seq., he has general responsibility for paying Title I funds to state educational agencies, and for enforcing the applicable laws, regulations, guidelines, contracts and assurances.

8. Defendant ________is State Superintendent of Schools for the State of ________, and under Sec._______of______, he has general responsibility for paying Title I funds to local educational agencies in the State of ______, for approving Title I project applications from such local educational agencies, and for enforcing the applicable laws, regulations, guidelines, contracts and assurances.

9. Defendant ______Municipal School Board has general responsibility for planning and administering the Title I program in the ______ Municipal School District in accordance with the applicable laws, regulations, guidelines, contracts and assurances.

10. Defendant _______is Superintendent and chief administrative officer for the ______ Municipal School District.

11. All defendants' acts alleged herein have been done under color of state or federal law, and all defendants are sued in their official capacities.

Facts

12. The public schools of the state of _____form______school districts, of which ______are county districts, ______are municipal separate districts, and ______are consolidated districts. State and local funds expended in these schools in 1969-1970 totaled $_____, of which $______ was state foundation aid funds, $______ was state equalization aid funds, and $______ was other state funds. $_______ was derived from county and district sources.

13. [Describe method of administering and authorizing expenditure of state educational funds.]

14. The public schools of the State of _____ received $______in federal funds in fiscal year 1969-1970, including $______ in Title I funds.

15. The ________Municipal School District expended $_______in school year 1969-1970, of which $______was state foundation aid funds, $______ was state equalization aid funds, and $______was other state funds. $_____ was derived from county and district sources.

16. [Describe method of obtaining and authorizing local funds for educational purposes.]

17. The table below shows the allocation of state and local funds for instructional purposes and for total current expenditures for each school in the ________Municipal School District, and the average expenditure per child at each such school.

18. Title I declared a Congressional policy of providing funds to school districts with high concentrations of children from low income families in order to benefit educationally deprived children. [hereinafter "target children"]. 20 U.S.C., Sec. 241a. The Act authorized the United States Commissioner of Education to make payments to state educational agencies according to a formula based upon the number of low income children living in the school districts in the State. 20 U.S.C., Sections 241b,241c. In turn, the state educational agency funds and approves Title I projects proposed by local educational agencies.

19. Under Title I, the _______ Municipal School District received $______ in 1965-1966, $______in 1966-1967, $______in 1967-1968, $______ in 1968-1969, and $_______ in 1969-1970.

20. In order to insure proper expenditure of Title I funds, in accordance with the intent of the Act and with the requirements of the Constitution of the United States, the defendants and their predecessors have promulgated various regulations and program guides, all of which have the force of law and are binding upon the defendants and state and local officials whose

agencies receive and transmit Title I funds.

21. In addition to the status of these regulations and program as binding law, they are also enforceable as contract provisions which have been agreed to by the LEA'S and by the State of ______.

22. The Title I Act and regulations require that Title I projects be "designed to meet the special educational needs of educationally deprived children" and that they be "of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting those needs..." 20 U.S.C., Sec. 241e.

23. A local educational agency administering a Title I program must make provision for evaluating the program's effectiveness in meeting the special educational needs of target children. 20 U.S.C., Sec. 241e.

24. A state educational agency must conduct periodic audits and evaluations of the Title I programs in effect in each local school district in the state and approve project applications submitted by LEA'S on the basis of the applicable laws, regulations, guidelines, contracts, and assurances. Furthermore, each state educational agency must execute a continuing assurance (as required by 20 U.S.C., Sec. 241f) that it will enforce all obligations and assurances of the LEA'S.

25. The Title I Act, regulations, and guidelines require that Title I

funds be used only to supplement, not to supplant state and local funds, and that target schools must offer comparable educational services to those offered by non-target schools in the district. 20 U.S.C., Sec. 241e. Program Guide Numbers 44 and 57. This comparability requirement refers to average instrumental costs per pupil, class size, personnel, facilities, and services.

26. Comparability also is promised by assurances signed by each LEA receiving Title I funds. On the 1968-1969 and 1969-1970 applications these assurances read as follows:

> The services provided with State and local funds for free public education in the project area will be maintained at levels that are comparable to those for non-project areas and the amounts of such funds expended in the project areas will be maintained at levels that are no lower than the levels that would have been maintained if no projects had been approved for those areas.

27. Each LEA must sign an assurance that it will repay all funds spent in violation of the terms under which it received those funds.

28. Title I funds may not be spent on construction or equipment unless demonstrably essential for the program's success. Program Guide No. 44

29. Title I funds may not be spent on ineligible or non-target children, nor in public or private schools not attended by target children. 45 C.F.R. 116.17(a). Title I funds are not general aid.

30. Parents of target children and other community members must participate in the planning, developing, monitoring, operating, and appraisal of Title I projects. 45 C.F.R. 116.18(f).

31. The terms and conditions of Title I projects must be made available, freely and publicly, by the LEA'S and by the State Educational Agency. 45 C.F.R., 116.34(d).

32. Title I funds may not be spent to foster segregation or allow or acquiesce in racial discrimination. 45 C.F.R. 116.21(f).

33. Recipients of Title I funds may not use those funds or other funds to discriminate on the basis of race or sex in ther terms and conditions of employment. 45 C.F.R. 80.

34. The investment per participating student of Title I funds should "equal about one-half the expenditures per child from state and local funds" in the local school district.

35. Attendance areas or schools selected as sites for Title I programs should have concentrations of children from low income families which are as high or higher than the percentage of such children for the district as a whole. Program Guide No. 44

36. In the state of ______, there have been continual and widespread violations of each of the requirements described in paragraphs 22-35.

37. Defendants Finch and Allen have failed to carry out their statutory obligations to enforce the requirements described in paragraphs 22-35, and to cut off Title I funds to non-complying districts.

38. Defendant ________(State Superintendent of Schools) has failed to carry out his statutory obligations to conform with and enforce the requirements described in paragraph 24.

39. Defendants ________(______Municipal School District Superintendent) and ______Municipal School Board have failed to carry out their statutory obligations to conform with and enforce the requirements described in paragrphs 22, 23,25 and 27-35.

40. The ______Municipal School District has used Title I funds for general school purposes rather than as supplemental compensatory funds for the special needs of target children, has used Title I funds to narrow the gap slightly between spending on target and non-target children in order to avoid their constitutional obligation to provide fully equal educational opportunities, has violated the community participation and public information requirements in order to prevent target children and their parents from questioning the use of Title I funds, and has in many cases spent Title I

money on white or non-target children, largely because of their unwillingness to see large sums of money go to black and poor children, in any circumstances, when the money might be given to white and non-poor children.

41. WHEREFORE, plaintiffs pray that this court:

(a). declare that defendants have violated the laws, regulations, guidelines, contracts and assurances cited herein;

(b). grant preliminary and permanent injunctions providing that Defendant ______(State Superintendent of Schools) must conduct periodic audits and evaluations of Title I programs in effect in the ______Municipal School District in order to ensure compliance with the laws, regulations, guidelines, contracts, and assurances cited herein;

(c). grant preliminary and permanent injunctions preventing Defendant (State Superintendent of Schools) from approving Title I project applications submitted by the ______Municipal School Board if said defendant is not complying with the laws, regulations, guidelines, contracts and assurances cited herein;

(d). grant preliminary and permanent injunctions providing that Defendants ______(______Municipal School District Superintendent) and ________Municipal School Board desist from using Title I funds as general aid; maintain all schools in the ________Municipal School District at comparable levels of equality and expenditures before the imposition of Title I funds; expend Title I funds for supplemental educational services for target children; expend Title I funds to meet the special educational needs of target children; desist from spending Title I funds on non-target children; provide for meaningful parental and community participation in the Title I program on a bi-racial basis; select target schools in accordance with the regulations; desist from using Title I funds to foster segregation; and make the terms and conditions of Title I projects freely and publicly available;

(e) grant preliminary and permanent injunctions providing that Defendants _____(______Municipal School District Superintendent) and _______Municipal School Board reallocate illegally expended Title I monies to lawful projects, or, alternatively, return such illegally expended funds to the Treasury of the United States;

(f) appoint a special master to administer the Title I program in the ______Municipal School District.

(g) grant preliminary and permanent injunctions providing that Defendants Allen and Finch conduct audits, follow-ups, check-offs, and other monitoring procedures to ensure that Defendants _______ (State Superintendent of Education), ________Municipal School Board, and ______(_________Municipal School Board Superintendent) comply with the laws, regulations, guidelines, contracts, and assurances cited herein;

(h) grant preliminary and permanent injunctions preventing Defendants Allen and Finch from approving Title I applications submitted by Defendant _________(State Superintendent of Education) if said

Defendant is not complying with the laws, regulations, guidelines, contracts and assurances cited herein;

(i) retin jurisdiction in the action until such time as defendants comply with the laws, regulations, guidelines, contracts, and assurances cited herein;

(j) award plaintiffs their costs and attorneys' fees; and

(k) grant such other and further relief as may be proper.

ALTERNATIVE ALLEGATIONS

1. Comparability of schools is required by the fourteenth amendment of the Constitution of the United States which, wholly apart from the requirement of racial desegregation, requires equality of schools attended by children of different races and has been recognized to require such equality at least since the decision of the Supreme Court in Plessy v. Ferguson, 163 U.S. 537 (1896).

2. All LEA's in ---------- have at all times in the past maintained, and most continue to maintain, dual school systems segregated by race.

3. In these dual school systems, black children have always received grossly inferior educations, because of school officials' affirmative acts of racial discrimination stemming from widely-held beliefs in the theory of white supremacy.

4. The most tangible acts of discrimination have been in the allocation of funds between white schools and black schools. For many years virtually no state or local funds were spent in black schools. As late as 1962, many LEA's spent approximately 10 times as much money on each white as on each black child. In the 1967-68 school year, all or most of the LEA's spent much more on each white child than on each black child, and many LEA's spent approximately twice as much on each white child as on each black child.

5. As a result of the generations of gross discrimination alleged above, black children attending school today form the great majority of the educationally disadvantaged children who are the intended beneficiaries of the Act.

6. These patterns of discrimination have also been maintained in

those school districts in which substantial school integration is occurring. In all or most of these school districts, all the violations described above are occurring except that the requirement of comparability between target and non-target schools no longer applies in these districts where the percentage of target children is approximately the same in all schools.

7. In such desegregating districts, the use of Title I funds for schools' general needs rather than for special educational needs of disadvantaged children, in violation of 45 CFR 116.17 (g), is especially critical because it allows Title I funds to be spent on non-target children and thus defeats the effort to create a unitary school system.

Mark Yudof

MEMORANDUM ON STANDING AND JURISDICTION

I. STANDING

With regard to Title I litigation initiated on behalf of pupils who are receiving Title I assistance, there is not an insurmountable standing problem. In *Peoples v. United States Department of Agriculture*, _____F. 2nd _____(D.C. Cir. 1970), No. 22, 574 (February 3, 1970) Judge Leventhal articulated the basic standards for implying a private right to sue under a federal statute:

> 1. The pertinent principles on the subject of standing have been reviewed and restated in our recent en banc decision in *Curran v. Laird*, No. 21040 (November 12, 1969) which discusses the recent Supreme Court precedents and underlying principles. *These principles establish a presumptive standing, operative unless negatived by a statutory provision, which permits a complaint, alleging that executive programs unlawfully deviate from statutory requirements, to be filed by those who were intended beneficiaries of the statutory provisions*, even though they are not the primary beneficiaries of the statute.
>
> There can be little doubt that the plaintiffs were in the category of those Congress intended to benefit in the food stamp program. This appears plainly from 7 U.S.C., Sec. 2011 (1964), wherein Congress declared:
>
> > It is hereby declared to be *the policy of Congress, in order to promote the general welfare, that the Nation's abundance of food should be utilized...to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low income households...*
>
> The principles of standing discussed above establish the standing of poor people to complain of illegal departures by the Secretary from the Congressional plan, since they are an intended beneficiary of Congress, and this principle is neither undercut by the fact that the farmers were also beneficiaries, nor dependent on some process of appraisal to determine whether the poor people weighed heavier in the scales than ther farmers, or which should be labeled the primary beneficiaries. (Emphasis added).

Undisputably, while Title I may benefit others, it was enacted primarily to benefit children of low income families:

> In recognition of the special educational needs of children from low income families and the impact that concentrations of low income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance...to local educational agencies serving areas with concentrations of children from low income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children. [20 U.S.C., Sec. 241a]

Therefore, as in the Peoples case, the beneficiaries have standing to complain that the Title I program is being administered in a manner which is inconsistent with statutory and administrative criteria. Indeed, in Bossier Parish School Board v. Lemon, 370 F.2nd 847 (5 Cir. 1967), the Fifth Circuit permitted "federal children" to challenge the local educational agency's administration of monies received under the federal impacted areas program (Public Law 874). The same result should obtain in Title I litigation.

I have not had time to research the question, but there is a possibility that taxpayers would have standing to challenge the unlawful expenditure of Title I funds.

II. JURISDICTION

1. If you plan to raise a constitutional question to which the Title I claim may be pendant, 28 U.S.C., Sec. 1343(3) should suffice. The welfare cases, e.g. King v. Smith, 392 U.S. 209 88S.Ct. ______(1968), would support this basis for jurisdiction.

2. If no constitutional claim will be made (other than a Supremacy Clause claim which is always present when state action is challenged as

contrary to a federal statute), an independent basis of jurisdiction will have to be found.

A. Section 1331

Snyder v. Harris, 394 U.S. 322, 89 S.Ct. 1053 (1969), held that the 1966 class action amendments did not change the old rule that aggregation of claims to reach the $10,000 jurisdictional amount, necessary for suits under Section 1331, was permissible only when the interests of the parties were joint, common, and undivided. In terms of Title I litigation there are two possibilities for avoiding the Snyder v. Harris pitfall: (1) aggregation is not necessary since the amount in question for each plaintiff is over $10,000; or (2) aggregation is possible since the interest is joint, common and undivided.

(1) The matter in controversy for each plaintiff exceeds the sum or value of $10,000.

While direct monetary damages to each plaintiff will be less than $10,000 ($300 [at most] per pupil of Title I money for 12 years adds up to only $3600), the lost educational opportunities resulting from the unlawful expenditure of Title I funds, and the impact of that loss on a recipient's personality and life prospects, should surely be valued at greatly in excess of $10,000. A national survey of earnings as they relate to educational levels found that high school graduates earned more than $30,000 above the earnings of non-graduates over their working lifetime. See Sexton, Education and Income, pp. 13-15 (1966). Title I is intended to meet the special educational needs of low income children and thereby to improve their performance in school so as to increase their chances of attaining higher educational levels (apologies to Paul Goodman and Edgar Friedenberg). Thus, educational attainment, Title I, and life prospects are connected in such a manner that the diversion of Title I funds may indirectly cause more than $10,000 in damages for each plaintiff.

The likelihood that the above argument will not succeed is great. See Rosada v. Wyman, 414 F.2nd 170 (2 Cir. 1969) and cases cited therein. However, the argument may be less difficult where injunctive relief only is sought. For example, in a recent school lunch case, Marquez v. Hardin, ____F. Supp. _____(N.D. Cal. 1969), No. 51446, Sept. 5, 1969, the Court held that the $10,000 jurisdiction amount for an action under Section 1331 had been satisfied:

> "Although the cost of a school lunch is only thirty-five cents, the amount in controversy for the purposes of Section 1331 is far greater. Plaintiffs' prayer is for injunctive relief, not damages, and in injunction cases the amount in controversy is the value of the right to be protected or the extent of the injury to be prevented...As Congress has expressly recognized, the right in question here is to good health, and to full physical and mental development...[Viewed in this light,] these rights are not remote or incidental and the damages are not entirely speculative."

(2) The claims are joint, common and undivided, and therefore aggregation is possible.

This may be the strongest jurisdictional argument. While the applicable law is somewhat confusing, Note,"Aggregation of Claims in Class Actions,"68 Colum. Law Rev. 1554 (1968), courts traditionally have employed two tests for determining whether claims are common and undivided such that aggregation is permissible. Id. at 1559-1561. First, the so-called "interest in the distribution" test requires that the adverse party have no individual interest in the apportionment of the judgment among the multiple claimants. Second, the "essential party" test permits aggregation only when none of the multiple claimants could assert his claim separately without affecting the rights of the other claimants. Ibid. See also 3A Moore's Federal Practice P. 23.13

In a recent First Circuit decision, decided about a month after Snyder, the Court in holding aggregation of claims in a class action allowable, expanded upon the traditional joint, common, and undivided claims formulation. Berman v. Narrangansett Racing Association, Inc. 414 F.2nd 311 (1st Cir. 1969). Berman was a suit by horse owners to force race tracks to distribute a larger share of the purse money to the owners. The court noted that the money would be paid into a fund, not to individual plaintiffs, and applied the "interest in the distribution test" to allow jurisdiction. In addition, the court suggested some other considerations which should be taken into account. 1. Are the claims common? Do the claims of the plaintiffs "constitute in their totality an integrated right against the defendant?" 2. Are the claims divided? Are there any contractual rights created between the defendants and individual plaintiffs? Do plaintiffs make any specific claims for individual payment? 3. A kind of essential party test. Are plaintiff's rights affected by the rights of the co-plaintiffs? Is this action being brought as a class action solely for the convenience of the claimants?

Applied to Title I, the above analysis suggests that educationally deprived children who are participating in Title I program have a joint and undivided interest in the lawful expenditure of Title I funds generally. Plaintiffs are not making individual claims, and the adjudication of any single claimant's rights will certainly affect the entire class. The point here is that dividing the total number of dollars received under Title I by the number of participating pupils is an inaccurate and artificial means of determining their interest in the program. Each plaintiff is not demanding 1/20 of a Title I teacher, or 1/2 of a textbook, or 1/50 of an educational film. Each plaintiff is demanding the supplemental educational services to which he is entitled, and this means a fully-salaried teacher and the whole array of educational equipment and supplies necessary to provide such services. Thus, each target pupil has an undivided and common interest in the total Title I grant to his school, and the unlawful diversion of the grant deprives him of services which cost greatly in excess of $10,000.

B. § 1343

"Since you will be claiming a misuse of funds under a federal statute, the claim exists by virtue of 42 U.S.C. § 1983. We argued in Rosado v. Wyman, supra, that whenever a claim is asserted under § 1983, § 1343 provides jurisdiction without regard to the amount in controversy. (See our brief). The problem is that § 1343 (3) talks of Acts of Congress "providing for equal rights" and § 1343 (4) talks of Acts of Congress "providing for the protection of civil rights," while § 1983 purportedly gives a claim where one is deprived of rights under any laws of the United States. In Rosado we explained this "gap" historically and urged that the two sections were really intended to be equivalent. We also argued that § 1983 is itself an equal rights or civil rights statute and thus §§ 1343 (3), (4) gave jurisdiction (albeit that the Social Security Act was not such a statute). The argument that § 1983 is a civil rights statute and hence any claim under § 1983 will support jurisdiction under § 1343 (4) was upheld in Worrell v. Sterrett, CCH

Pov. L. Rep. para. 10,575 and Gomez v. Florida State Employment Service, CCH Pov. L. Rep. para. 10,479. You have an additional argument in Title I cases -- namely, that the ESEA is an "equal rights" statute and thus claims under it may be asserted via § 1343 (3). See my article on § 1343 jurisdiction in the January 1970 Clearinghouse Review, and the articles by Bob Cover cited therein." Letter from Steven J. Cole, Columbia Center on Social Welfare Policy and Law, to Mark G. Yudof, Harvard Center for Law and Education.

C. §§ 1361, 1391

These sections provide for jurisdiction over federal officials. The attached opinion of the court in Marquez v. Hardin outlines the issues that must be considered in this regard. See also 67 Colum. L. Rev. 84 (1967).

BERMAN V. NARRAGANSETT RACING ASSOCIATION,
414 F. 2d 311 (1st Cir. 1969).

Before ALDRICH, chief Judge, McENTEE and COFFIN, Circuit Judges.

McENTEE, Circuit Judge.

These consolidated appeals are from dismissals of three class actions brought under Fed. R. Civ. P. 23 by plaintiffs as representatives of a class comprised of licensed owners of horses that have won purses at the defendants' race tracks. Two of the suits were commenced in the district court of Rhode Island and the third in the district of New Hampshire. In all three the gravamen of the complaint is that for over three decades the defendants had failed to pay to the plaintiff pursewinners certain monies alleged to be theirs under annual purse agreements, and that this fact had been fraudulently concealed from them by the defendants. Plaintiffs pray for an accounting, injunctive relief, and damages in the amount of several million dollars.

In each case the defendant moved to dismiss the complaint on four grounds: (1) the court lacks jurisdiction because the matter in controversy is not in excess of $10,000 within the meaning of 28 U.S.C. 1331....

....

Turning to the question of jurisdiction, we note that any argument that plaintiffs may have made in the district courts that their claims individually exceed $10,000 has not been pressed on appeal. As stated in their briefs, they rely "solely upon aggregation on the jurisdictional issue." In order to succeed they must bring themselves within the latter half of the rule succinctly stated in Pinel v. Pinel, 240 U.S. 594, 596, 36 S. Ct. 416, 417, 60 L.Ed. 817 (1916):

> "The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount."

In Snyder v. Harris, 394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed.2d 319 (1969), the Court stated that the doctrine of aggregation is based upon its interpretation of the statutory phrase "matter in controversy." The New Hampshire district court found that since no single plaintiff has a contractual right to a portion of the withheld money, there was no definable amount or matter in controversy. But "in determining the matter in controversy, we may look to the object sought to be accomplished by the plaintiffs' complaint: the test for determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce." Ronzio v. Denver & R.G.W.R. Co., 116 F.2d 604, 606 (10th Cir.1940). An examination of the pleadings leaves no doubt that the object of these suits is to determine whether, under the annual agreements, the provision that entitles the class of pursewinners to 44.7% of the defendants' share of the money wagered also entitles them to a like share of the breakage. All other objects of the action depend upon plaintiffs' ability to establish this right. The pecuniary result that the judgment would directly produce would be the awarding of a fund of several million dollars to the class. We think it is the amount of the entire fund, and not what each pursewinner's individual share will eventually be, that determines the amount in controversy here.

Further, the interest of the group of pursewinners in the asserted right is common and undivided. "It is not necessary that the claims of the plaintiffs be joint, in the technical legal sense of that word, as opposed to several. But it is essential that these claims constitute in their totality an integrated right against the defendant." A. Dobie, Federal Procedure 58, at 158 (1928); Manufacturers Casualty Insurance Co. v. Coker, 219 F. 2d 631, 633-634 (4th Cir. 1955). No contractual rights are created between the defendants and individual pursewinners, and plaintiffs make no specific claims for individual payment. As we view it, the case before us is analogous to a shareholder's derivative action or a suit against a trustee in which the sum, if recovered, would be paid into a corporate treasury or trust estate for later proportional distribution. See Dixon v. Northwestern National Bank, 276 F.Supp. 96 (D.Minn.1967). Here, assuming the recovery of the fund, a formula must be established before the members of the class can benefit individually....There can be no doubt that plaintiffs' rights are "affected by the rights of co-plaintiffs."

....

The fact that plaintiffs pray for a distribution is only ancillary to the primary relief sought and does not affect the amount in controversy or the integrated nature of plaintiffs' claim....

In cases contemplating the distribution of a fund, it has long been settled that one factor of considerable importance on the issue of whether the plaintiffs' interests are aggregable is whether the defendant has an interest in how the fund will be apportioned if plaintiffs prevail.... Here, the defendants' only obligation would be to see that 44.7% of their share of the "breakage" is made available to the class. Under any formula that is finally adopted, defendants' liability is the same. The interests of the plaintiffs, vis a vis the matter in controversy, are "common and undivided" and the fact that their interests are separable among themselves is immaterial.

....

The judgments of the district courts are reversed and the cases are remanded for consideration of the other grounds for dismissal raised in defendants' motions.

MARQUEZ V. HARDIN
F. Supp. (N.D. Cal. 1969)
No. 51446 (September 5, 1969)

PECKHAM, District Judge:

Plaintiffs seek a preliminary injunction enjoining the Secretary of Agriculture and other federal defendants from "failing or refusing to enforce their statutory duty to ensure that all needy [school] children . . . participating in the National School Lunch Program be provided with a free or reduced-price school lunch . . . and from failing and refusing to issue standards of eligibility in accordance with Federal-State minimal survival guidelines and their statutory duties."

. . . .

The Defendants resist the preliminary injunction and move to dismiss the complaint, or in the alternative, for summary judgment on the grounds that

1. The Secretary of Agriculture has no such duty;
2. The court does not have jurisdiction to entertain the suit; and
3. An indispensable party is lacking.

. . . .

B. **Jurisdiction.**

1. 28 U.S.C. § 1361. Mandamus.

Plaintiffs contend that these regulations are an insufficient fulfillment of the Secretary of Agriculture's duty under the Act to give reduced price or free lunches to needy children because it is merely precatory. The plaintiffs want the defendants to be enjoined from failing to insure that all needy children in California who participate in the program get reduced price or free lunches. Although cast in terms of a restraining injunction, the request for relief is actually a mandatory injunction, and a mandatory injunction against a public officer forcing him to perform a duty under a statute is "in the nature of mandamus" within the meaning of 28 U.S.C. § 1361. Cf. Johnson v. Interstate Power Co., 187 F.Supp. 36, (D.S.D. 1969).

Section 1361 vests this Court with jurisdiction since plaintiffs' complaint is an effort to compel "an officer . . . of the United States . . . to perform a duty owed to the plaintiff." The legislative history of the statute makes it clear that Congress' primary intention was to expand the availability of the remedy as it then existed rather than to expand the scope of the remedy. 2 U.S. Code Cong. and Admin. News 2784 (1962). See White v. Adm'r. of G.S.A., 343 F.2d 444 (9th Cir. 1965). [Prior to 1962 it had been held that as the result of historical accident, mandamus and even equitable mandatory relief could only be had against the United States in the District Court for the District of Columbia. The matter is presented in some detail in 3 K. Davis, Administrative Law Treatise § 23.10 (1958).] Since the remedy was not intended to be expanded by § 1361, the question arises as to the extent to which strict regard must be had for the ancient complexities of the law of mandamus.

Professor Davis makes a very convincing showing that the traditional "ministerial-discretionary" distinction in mandamus law was the result of misinterpretation of early Supreme Court cases and, more importantly, that the distinction has been productive of much mischief and, therefore, often has been disregarded by the Supreme

Court. 3 K. Davis, supra at § 23.11 and especially the discussion of Robertson v. Chalmers, 341 U.S. 37 (1951), at 357-60. Nonetheless, a very substantial body of precedent supports the ministerial-discretionary distinction in one fashion or another and this Court does not feel free simply to ignore it. However, this does not mean that we must blindly follow ancient rules to absurd or unjust conclusions. The question of whether a particular matter is ministerial or discretionary is itself a question of law for the Court to decide. It is apparent that the former category has often been stretched to reach a just result. 3 K. Davis § 23.11 at 354-56, citing Wilbur v. U.S. ex rel Krushnic, 280 U.S. 306 (1930).

Professor Byse, an architect of § 1361, is in full accord with Professor Davis on simplifying and minimizing the limitations on mandamus and on limiting or preventing the application of mandamus principles to equitable relief of all varieties. Byse, Section 1361 of the Mandamus and Venue Act of 1962 and "nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308 (1967). In this article Byse states (at 332-33):

> Properly understood, the notion that mandamus principles should govern the availability and and scope of review in an action for mandatory injunctive or declaratory relief merely restates the rule that an officer's valid exercise of a delegated power will not be controlled by the judiciary. The crucial issue in all cases is the scope of the delegated power. The superiority of the equitable tradition stems from the fact that in actions applying equitable principles "courts and counsel typically focus immediately upon merits," that is, the scope of the delegated power, whereas in cases applying mandamus principles, analysis often is clouded by ministerial-discretionary distinction and other technicalities of mandamus law. [Footnotes omitted]. Byse, supra, at 332-33.

Without going further into the complexities of this issue, it is apparent that whatever view we take of the ministerial-discretionary distinction, the statue must be examined to determine the scope of the Secretary's discretion.

Looking at the statute, it is fair to say that if the Secretary of Agriculture learns that federal funds are being applied in a manner substantially different from the congressional mandate, it is his duty to in some way remedy the situation. The statute says that the free or reduced price lunches "shall" be served to needy children and that the local agencies shall keep records "as may be necessary to enable the Secretary to determine whether the provisions of this chapter are being complied with." 42 U.S.C. § § 1758, 1760(a). If the local agencies fulfill their obligation to determine who is needy, then the Secretary need do nothing. If it is brought to his attention that the States are misapplying the funds he should take steps to insure that either the funds are applied correctly or terminated. Exactly in what manner he does the latter is the area in which he has discretion, because the statute does not spell out any specific method to insure compliance. This analysis also places the primary responsibility for compliance on the States because they are given the first opportunity to comply.

. . . .

2. 28 U.S.C. § 1331: General Federal Question.

General federal question jurisdiction, unlike mandamus under § 1361, requires that $10,000 be in controversy. This rule applies to each plaintiff; aggregation of claims is not permitted in a F.R.Civ.P. 23(b)(3) class. *Snyder v. Harris*, ____ U.S. ________, 22 L.Ed.2d 319 (1969). However, the intricacies of mandamus law

2

should not be imported into a case arising under § 1331; the ancient rules have generally been productive of mischief and injustice and there is no "policy" reason for importing them here. § 1331 constitutes an independent basis for jurisdiction so that it cannot be argued that granting a mandatory injunction under this section is an "evasion" of § 1361. Modern equitable principles have, in their own way, as great a regard for the smooth functioning of the government and its officials as do the common law restrictions on mandamus. The difference is that the former is more flexible and considers the merits of each controversy while the latter establishes categories and simply prohibits judicial scrutiny if the respondent's "discretion" is involved.

Although the cost of a school lunch is only thirty-five cents, the amount in controversy for the purposes of § 1331 is far greater. Plaintiffs' prayer is for injunctive relief, not damages, and in injunction cases the amount in controversy is the value of the right to be protected or the extent of the injury to be prevented. Pennsylvania R. Co. v. City of Girard, 210 F.2d 437 (6th Cir. 1954); 1 Baron & Holtzoff, Federal Practice and Procedure. (Wright ed.) sec. 24 n.54. Accord, Connelly v. Univ. of Vermont and State Agricultural College, 244 F.Supp. 156, 159 (1965) (citing Baron & Holtzoff). As Congress has expressly recognized, the right in question here is to good health, and to full physical and mental development. The preamble to the Act, 42 U.S.C. § 1751, states that one of its purposes is to ". . . safeguard the health and wellbeing of the Nation's children . . . ." *Cf.* 42 U.S.C. § 1771(c). *See also* House Report No. 1114 (90th Cong., 2nd Sess.) on the 1968 Amendments to the Act, P.L. 90-302, as reported in U.S. Code Cong. and Admin. News at 1934 (1968).

Viewed in the light of this legislative history, these rights are not remote or incidental and the damages are not entirely speculative. Further, unlike diversity cases such as Snyder v. Harris, supra, these plaintiffs have no alternative forum in which to seek redress. If the Secretary of Agriculture owes them a duty, a state court would be unable to act against him. Even if a state court were able to entertain this suit, it would be anomalous for a federal court to be unable to hear a controversy principally involving federal law. As Professor Wright points out, there are exceedingly few federal question cases in which the $10,000 limit actually applies and when it does and is not met, the result is only to keep out of federal court a case in which it has special interest and expertise. Wright, Federal Courts 92-93 (1963).

BOSSIER PARISH SCHOOL BOARD V. LEMON
370 F. 2d 847 (5 Cir. 1967)

Before BROWN, BURGER, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge:

This Court has had to deal with a variety of reasons that school boards have managed to dredge up to rationalize their denial of the constitutional right of Negro school children to equal educational opportunities with white children. This case presents a new and bizzare excuse. Here the alleged reason for the admitted discrimination is that the Negro children are "federal children"; they are children of parents in uniform who are stationed at Barksdale Air Force Base. Barksdale is a United States defense base in Bossier Parish—a federal enclave. . . .

The district court denied the defendant's motion to dismiss. The court granted the plaintiff's motion for a summary judgment and issued an injunction ordering the school authorities to submit a desegregation plan for Bossier public schools. We affirm.

The district court found that the United States Department of Health, Education and Welfare provided financial aid to the Bossier Parish school system to the amount of nearly two million dollars between 1951 and 1964 under the provisions of 20 U.S.C. 631 - 645. In return the school board gave various "assurances" to the United States that children of personnel stationed at Barksdale would be admitted to the schools "on the same terms, in accordance with the laws of the State in which the school district of such agency is situated, as they are available to other children in such school district.***" (Emphasis added.) 20 U.S.C. 636 (b) (1) (F). The court found also that subsequent to the passage of the Civil Rights Act of 1964, the school board accepted payments from the United States amounting to half a million dollars for operation of its schools during the year 1964 - 65.

The able trial judge, in an opinion we adopt as part of the opinion of this Court, held that the plaintiffs have standing to sue:

> "(Although) these assurances do constitute a contractual agreement *** all Louisiana laws providing for segregation in public schools were declared unconstitutional in Orleans Parish School Board v. Bush, 242 F.2d 156, (5 Cir. 1957) cert. denied, 354 U.S. 921, 77 S.Ct. 1380, 1 L.Ed. 2d 1436 .... Defendants by their contractual assurances have afforded rights to these federal children as third-party beneficiaries concerning the availability of public schools. Such rights are identical in weight and effect to those rights possessed by children who are entitled to attend Bossier Parish schools simply because of residence instead of by contract. Having thus obligated themselves defendants are now estopped by their contractual agreement, and their acceptance of federal funds paid pursuant thereto, to deny that plaintiffs are entitled to the same rights to school attendance as are resident children. *** We must further find that the board's acceptance of funds for maintenance and operation of schools during the 1964 - 65 school year shows that defendants intended to abide by that contract by continuing to provide education for federal children. This acceptance constituted a further ratification of the contract by which defendants agreed to provide such education, and, therefore, it acted as a ratification of the assurances given when the construction funds were received."

. . . .

The judgment of the district court is affirmed.

October 17, 1969

Mr. Terry Lynch
Office of Programs for the Disadvantaged
United States Department of Health, Education & Welfare
Room 4075
400 Maryland Avenue, S.W.
Washington, D.C.

Dear Terry:

I have been surprised and disturbed to hear that some HEW administrators and lawyers have doubts about the enforceability of the comparability requirement in Title I, ESEA, especially because it is becoming clearer each day that comparability is at the heart of the Title I problems in the South and probably elsewhere.... Let me outline a few reasons why it is clear to me that the comparability requirement is not only enforceable, but is constitutionally required as well. In thinking about this, you should keep in mind that when Congress passes broad legislation stated in general terms, it expects that the agency administering the law will fill in the details with regulations, guidelines, and rules of interpretation, and that whenever courts are confronted with such "interstitial legislation," they tend to defer to the administrator and uphold the regulation unless there is a clear showing that it is not reasonably designed to carry out the statute. With that background, there are at least four sources of law (federal statutes and constitutional provisions) which support the comparability requirement in 45 C.F.R. 116.17 (h).

(1) 20 U.S.C. 241 (Title I, ESEA). This is a compensatory education statute. It provides funds, as 20 U.S.C. 241e(a) (1) says, for the special needs of educationally disadvantaged children, and is not designed to provide general aid to education. Items paid for in non-target schools out of state and local money are by definition general education expenses, and the comparability regulation simply says that these items in target schools must also be paid for with state and local funds.

(2) Fourteenth amendment. The equal protection clause of the fourteenth amendment requires public bodies to treat their constituents equally. Thus each school board must maintain comparable schools for all its children. This requirement applies to all children, not simply those who are the victims of racial discrimination. (Some people are confused by the relationship of equality to desegregation; all that the Brown decision did was to impose the requirement of desegregation in addition to the equality requirement which had been present in the law at least since Plessy v. Ferguson, 163 U.S. 537 (1896), and which is still present. You will notice that court orders in school cases typically include portions requiring equalization.) Secondly, some people have mistakenly assumed

that the recent case of McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), aff'd per curiam sub nom. McInnis v. Ogilvie, 22 L. Ed. 2d 308 (1969), contradicts the equality requirement. That case, however, held only that courts could not require different districts to spend equal amounts. The case has nothing to do with different children in the same district, and nothing in the opinion in any way justifies a single governmental body in spending different amounts of money on different children.

(3) Title VI, Civil Rights Act of 1964. This situation is most egregious when the inequalities are racial. Here, Title I money is used to allow the school boards to avoid responsiblity for the grossly inferior and under-financed black schools that they have maintained. In these cases, the failure to maintain equality and comparability is also a violation of Title VI of the Civil Rights Act of 1964, since the Title I money is spent on programs which discriminate on the basis of race.

(4) Article VI of the Constitution. This is a familiar portion of the Constitution that many would like to ignore, which says quaintly that the Constitution and federal laws under it are the Supreme Law of the land. A federal statute providing money for certain purposes is subverted when a state spends that money to fulfill state responsibilities rather than to achieve the federal purpose. Three courts have held that using federal impacted-area funds to supplant state funds violates the supremacy clause. Shepheard v. Godwin, 280 F. Supp. 869 (E.D. Va. 1967); Douglas Independent School District No. 3 v. Jorgenson, 293 F. Supp. 849 (D.S.D. 1968); and Hergenreter v. Hayden, 295 F. Supp. 251 (D. Kan. 1968).

In short, the comparability regulation, far from being a bold exercise of doubtful power, is an obvious and mandatory response to a host of constitutional and statutory provisions. (This view applies to the language added to section 116.17(h) in 1968 as well as to the prior language, since the new language merely restates the obvious -- a point recognized by W. L. Hearn, State Coordinator of Title I Programs for Mississippi, in his deposition in Taylor v. Coahoma County Board of Education.)

The comparability regulation, 45 C.F.R. 116.17(h), simply builds on and seeks to enforce the requirement of equality. This is most easily seen where, for example, a school superintendent reports that, with Title I money, he has finally been able to repair all the windows and toilets in a school attended by target children. This is nothing more than a statement that the state and local money that should have been spent on these repairs was stolen from these children to be spent on other children (unless all schools in the district were in equal disrepair). This example may seem clearer than most because it involves an expenditure that has nothing to do with Title I by any stretch of the imagination; but equality (and Title I) are violated whenever anything provided for target children with Title I money has been provided for non-target children out of state and local money. In any such case, there is larceny, and it cannot be dressed up to mean anything else. A general rule can be stated (subject only to qualifications based on legitimate differences in types of services provided, and on the possibility that the capital value of target children's facilities exceeds that on the non-target children's facilities): the general rule is that where the current per-pupil expenditures are greater for non-target children than for target children, any Title I money that does no more than close the gap is illegal and unconstitutional because there is no equality.

I cannot emphasize strongly enough the importance of this analysis. It is wrong for the state and the local school board to provide more money, services and facilities for some children than for others, and the fact that Title I money may be spent for worthwhile or essential services for target children does not make it any more proper; rather, the Title I money is simply allowing the state and local officials to continue to steal state and local money from target children.

I hope this will clear up some of the questions that may be raised about comparability, or provide food for thought for those who worry about their ability to enforce it. I would appreciate being apprised of any more specific doubts, or any objection to the points in this letter, so that I may respond further.

Sincerely,

Armand Derfner

mfd

Via Airmail

COMMUNITY PARTICIPATION IN THE TITLE I DECISION-MAKING PROCESS

Parental and community involvement in the Title I decision-making process is vital to the success of the program. This need is recognized – albeit ambiguously – in the Title I regulations and guidelines. Compliance with statutory and administrative criteria may result in the offering of desirable educational services to poor children, and empirical evaluations may yield some insights into the effectiveness of the program, but ultimately those people for whom Title I is intended can say better than anyone else whether the program is working for their benefit.

The need for the involvement of the beneficiaries is made clearer by the fact that the local educational agencies have broad discretion in choosing among possible educational services, and that there are strong indications that these choices tend to be made on the basis of the needs of the teachers and administrators rather than on the needs of the disadvantaged children the Act is intended to serve. Furthermore, the parents and the community represent an untapped educational resource; their participation may also reaffirm the sense of the dignity and worth of the people in the community involved. As Edgar Cahn has stated, "When a grown man is treated as a child, with respect to those very services being rendered him, he is unlikely to view those services as anything other than rituals of humiliation. . ." One may add that the same is true when the services are offered his children.

Aside from the requirement that the planning and execution of Title I projects be coordinated with programs under the Economic Opportunity Act and that the local Community Action Program director attest to the involvement of community groups in the program, the Act itself does not require community or parental involvement in Title I. The regulations state, however, that:

> Each local educational agency shall provide for the maximum practical involvement of parents of educationally deprived children in the area to be served in the planning, development, operation, and appraisal of projects, including their representation on advisory committees which may be established for the local Title I program. [45 C.F.R. Sec. 116.18(f)]

This regulation is based on the premise that in order to set the "priority needs" of the educationally deprived, a statutory prerequisite, there must be "consultation with teachers, parents, private school authorities and representatives of other agencies which have a genuine and continuing interest in such children." [Guideline No. 46, July 2, 1968]. The institutional framework for achieving this "consultation," however, is unclear. The regulations refer to advisory committees as an acceptable means of involving parents, and at one point, the U.S. Commissioner of Education went so far as to say that ". . .each Title I applicant must have an appropriate organizational arrangement. This means, in effect, that local advisory committees will need to be established for the planning, operation, and appraisal of a comprehensive compensatory educational program." [Guideline No. 46] However, less than three weeks later, the Commissioner retreated from this position and announed that "local conditions may favor other arrangements, ... Whatever arrangement is decided upon, it should be one which your office. . . .finds likely to be effective in increasing community and parent participation in Title I programs for impoverished children." [Guideline No. 46-A] The obvious conclusion to be drawn is that no specific institutional structure is mandated by either the regulations or the guidelines, but that local educational agencies are obligated to set up some structure that works. In this regard, the Commissioner's "suggested" composition and functions of the advisory committee provide a strong indication of how an effective community and parental involvement program should operate:

> It is suggested that at least 50% of the membership of the committee consist of parents of disadvantaged children attending schools serving the area where projects will be conducted, representatives of the poor from the Community Action Agency and parent members of the Head Start advisory committee, if there is a Head Start project in the community, and representatives of other neighborhood-based organizations which have a particular interest in the compensatory educational program."
>
> The local advisory committee should have specific functions, such as:
>
> A. Supply information concerning the views of parents and children about unmet educational needs. . .and establish priorities among these needs.
>
> B. Recommend a general plan for the concentration of funds in specific schools and grade levels.
>
> C. Participate in the development of proposals. . .to/bridge/ the gap between the needs of the pupils and the curriculum of the school.
>
> D. Make written concurring or dissenting comments to be forwarded with the application.

E. Act as a hearing committee for suggestions to improve the compensatory educational program.

F. Hear complaints about the program and make recommendations for its improvement.

G. Participate in appraisals of the program.

There is abundant evidence that the community participation requirements are often ignored in form and almost always ignored in spirit. In 1968, the National Advisory Council on the Education of Disadvantaged Children reviewed 116 Title I programs and found that only two provided for meaningful parental or community involvement in Title I policy decisions, although a larger number did have "paper" community boards. It further appears that the local Community Action Programs rarely engage in any significant monitoring of the local educational agency's use of Title I funds. Where it is necessary to engage in litigation to correct other abuses under Title I [see *Inequalities in Education*, Number Two] an essential element of the suit must be an attack on the failure of the local educational agency to provide for community involvement, and of the failure of the U.S. Office of Education and the state educational agency to disapprove the project application on those grounds. Without assuring community monitoring of the Title I program's administration on a day by day basis, any victory in the courts will be of little avail.

Whether or not there are other serious violations in local Title I administration calling for litigation, it is appropriate for representatives of the community interest to inquire as to the degree of monitoring and control undertaken by the CAP or any community board established under the local Title I project. The advantages of community participation in Title I decision-making are, of course, not limited to assuring compliance with court decisions; the effort of assuring expression of the community's interest in Title I is worth making wherever Title I funds are being spent. Where community boards exist only on paper, every attempt should be made to activate them. Where they do not exist at all, pressure should be applied to the local educational agency, the state and federal offices of education, and the local CAP to bring a community board into existence.

An active community board could well gain a veto over inappropriate or improper Title I spending or could work with the CAP in the absence of a sympathetic response by the local educational agency. CAP education officers or legal services programs could provide the community board with the technical resources necessary to understand and evaluate the forbidding documentation of Title I projects. The ability and time necessary to exercise significant control over a Title I program are such that it may be necessary to compensate community board members for time away from their jobs to assure their effective particpation in their board work.

A secondary benefit of an active community board under Title I is the potential for creating a group of community people both knowledgeable about education and versed in dealing with educators. Such people could exert community influence over education practices in areas far beyond the relatively narrow limits of Title I.

Mark G. Yudof

James A. Bensfield

THE LEGAL STATUS OF TITLE I PROGRAM GUIDES

Title I of the Elementary and Secondary Education Act of 1965 requires that state educational agencies approve project applications from local districts "consistent with such basic criteria as the Commissioner may establish." 20 USC 105 (a) These criteria have been promulgated by the U.S. Office of Education in one of two forms: "Regulations" and "Program Guides."

The Regulations (which appear in the Code of Federal Regulations, Title 45, Part 116) were drawn up shortly after the ESEA was passed and have been periodically amended. Subpart C ("Project Applications") contains most of the basic standards by which state educational agencies must evaluate the size, scope, and quality of local programs. There is little doubt that the Regulations are legally enforceable, since the Commissioner in issuing them was acting in accordance with an express grant of legislative power. It is a maxim of administrative law that a court will no more substitute judgment on the content of a valid legislative rule than it will substitute judgment on the content of a valid statute. 1 Davis, Administrative Law, Section 5.11 (See also King v. Smith and Thorpe v. Housing Authority, discussed infra)

The Program Guides are designed to clarify, expand upon, or emphasize certain of the standards set out in the Regulations, especially those contained in Subpart C. They are made available in memorandum form to all state educational agencies passing on Title I project applications. Some of the Guides are short, and deal only with one specific aspect of Title I administration. Program Guide Number 46, for example, deals with community participation, adding substantially to a concept which is only mentioned briefly in the Regulations; numbers 45-A and 57 discuss only the "Comparability" standard set out in the Regulations. Number 44, on the other hand, is a more extensive document which covers nearly all of the criteria which local and state education agencies must meet before their applications can be approved.

Although the Program Guides "are based on the law and are derived from the Regulations" (Guide #44), there may still arise some question as to their legal enforceability. Since they are not published in the Federal Register, since they are subject to numerous revisions, and since they look more like memoranda than laws, it is conceivable that the issue may be raised. The Guides should, however be treated as having the same legal force as the Regulations. There are several reasons why this is so.

First, the language of the Act itself does not put any limitations on the form of the rules which the Commissioner is authorized to lay down. It speaks only of "criteria," and the Program Guides certainly fall under the rubric of that term. The title of Number 44, for example, is "revised Criteria for the Approval of Title I, ESEA, Applications from Local Educational Agencies," and, in the introduction to that Guide, the Commissioner himself indicates that "the revised criteria reflect the requirements of both Sections 105 (a) and 803 (a) /‾of the Act_/."

Given that the Criteria clearly fall within the terms of the Act, they are judicially enforceable. In an analogous case, King v. Smith, 392 U.S. 309 (1968), the Supreme Court held that an Alabama AFDC plan "must conform" with the Social Security Act "and with the rules and regulations promulgated by HEW." In Thorpe v.Housing Authority of the City of Durham, 393 U.S. 268 (1969), the court upheld the authority of the U.S. Department of Housing and Urban Development to promulgate regulations covering the eviction procedures employed by local housing authorities. The Court pointed out in that decision that such broad rule-making powers have been granted to numerous other Federal administrative bodies in substantially the same language, including the Secretary of HEW.

Second, there are clear indications in the Guides themselves that they are *intended* to be binding on the state educational agencies. As the Commissioner said in Number 44: "The following criteria are based on the law and the regulations and were formulated to meet the need for a set of general statements of the essential characteristics of an approvable Title I program." Furthermore, the office of the legal advisor to Title I has indicated that the Guides are, in effect, regulations, that they have been cleared through the General Counsel's Office (like the regualtions), and that a court of law should not pay any attention to technical distinctions between Regulations and Program Guides when it comes to enforcing the latter.

Third, the Administrative Procedure Act does not affect the legal status of the Guidelines. Although the Act [5 USC 553(b)] requires notice in the Federal Register of proposed rule-making, that section is made inapplicable to a matter involving federal grants [5 USC 553(a)(2)]. This would certainly include regulations covering the allocation of Title I funds. Furthermore, that section of the Act [5 USC 552(a)(1)] which requires publication in the Federal Register of the terms of administrative regulations also does not impair the legal enforceability of the Guidelines. The Act says only that if a regulation is published in the Register, all persons have constructive notice and are therefore bound by it. It does not say that failure to publish removes a regulation's legal effect. The Attorney General's memorandum on the Public Information Section of the Administrative Procedure Act (June 1967, pp. 11, 12) points out that the Act's legislative history indicates that unpublished acts are not necessarily without legal force and that actual notice would cure any defect of nonpublication. A person with actual notice is just as equally bound with a person who has constructive notice by virtue of publication in the Register. Since the Title I Guidelines are sent directly to all state educational officials, and through them to local authorities, there is no problem with this section of the APA.

It should be noted, finally, that most of the important standards for evaluating the legality of Title I Projects are contained in the Regulations. In a lawsuit challenging a misappropriation of Title I money it may not even be necessary to refer to the Program Guides. If, however, a criterion contained in the Guides is being violated, one should not hesitate to treat that criterion as having the same legal status as a Regulation.

SAMPLE
INTERROGATORIES

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, you are required to answer separately under oath, within fifteen days of service hereof, the following Interrogatories:

1. Indicate the name of the person employed as the Superintendent of the Bernalillo school district for each school year from 1965-1970, and the amount of his salary.

    a. Indicate whether this person's salary was paid entirely from funds provided under Title I of the Elementary and Secondary Education Act.

    b. Indicate whether this person's salary was paid in part from funds provided under Title I of the Elementary and Secondary Education Act, and the amount of that partial payment.

    c. If said salary was paid in part from Title I funds, indicate the services which this person provided students eligible for Title I assistance.

2. Indicate the names of the persons employed as Clerical Assistants by the Bernalillo school district for each school year from 1965-1970, the schools to which each was assigned, and the salary that each was paid.

    a. For each clerical assistant, indicate whether her salary was paid entirely from funds provided under Title I of the Elementary and Secondary Education Act.

    b. For each clerical assistant whose salary was paid entirely from Title I funds, did she provide services exclusively to students eligible for Title I assistance?

    c. For each clerical assistant whose salary was paid entirely from Title I funds, describe the specific duties which her employment entailed.

    d. For each clerical assistant, indicate whether her salary was paid in part from funds provided under Title I of the Elementary and Secondary Education Act and the amount of that partial payment.

    e. For each clerical assistant whose salary was paid in part from

Title I funds, did she provide services to students eligible for Title I assistance?

f. For each clerical assistant whose salary was paid in part from Title I funds, describe the specific duties which her employment entailed, including a description of the services which she provided students eligible for Title I assistance.

3. For each school year from 1965-1970, did the Bernalillo school district conduct an audit of the Bernalillo public schools?

a. If so, does there exist a document embodying the results of that audit?

b. If such a document exists, state the name and address of the person who has custody and control of the original of said document, and attach a copy thereof to your answer.

c. If such an audit was not conducted, specify, in detail, the nature and amount of expenditures made under budget item "Audit-Fiscal Control" (Code No. 120.4)

4. Indicate the names of the persons employed as Consultants by the Bernalillo school district for each school year from 1965-1970, the schools to which each was assigned, and the salary that each was paid.

a. For each consultant, indicate whether his salary was paid entirely from funds provided under Title I of the Elementary and Secondary Education Act.

b. For each consultant whose salary was paid entirely from Title I funds, did he provide services exclusively to students eligible for Title I assistance?

c. For each consultant whose salary was paid entirely from Title I funds, describe the specific duties which his employment entailed.

d. For each consultant, indicate whether his salary was paid in part from funds provided under Title I of the Elementary and Secondary Education Act and the amount of that partial payment.

e. For each consultant whose salary was paid in part from Title I funds, did he provide services to students eligible for Title I assistance?

f. For each consultant whose salary was paid in part from Title I funds, describe the specific duties which his employment entailed, including a description of the services which he provided students eligible for Title I assistance.

5. Indicate the names of the persons employed as Teachers by the Bernalillo school district for each school year from 1965-1970, the school to which each was assigned, the grade level or leves which each taught, the number of years of teaching experience that each had had prior to the beginning of the school year, the most advanced academic degree that each had achieved, the number of months during the school year that each was paid, and the salary that each was paid.

a. For each teacher, indicate whether his salary was paid entirely from funds provided under Title I of the Elementary and Secondary Education Act.

b. For each teacher whose salary was paid entirely from Title I funds, indicate whether he provided services exclusively to students eligible for Title I assistance.

c. For each teacher whose salary was paid entirely from Title I funds:

1. Specify the subjects which he taught during the school year.

2. Specify the total number of teaching hours devoted to each subject during the school year.

3. Specify the total number of overtime hours for which he was paid from Title I funds and the services which he performed during the school year.

4. List the names of the students enrolled in each class which he taught in each subject.

5. Designate the subjects and classes which he taught which were part of the Title I program in the district.

6. Designate the names of the students enrolled in each class which he taught in each subject, who were eligible for Title I assistance.

7. Describe how the Title I program classes which he taught differed from regular school classes.

8. Specify any other services which he provided students eligible for Title I assistance.

9. Specify any other services which he provided students ineligible for Title I assistance.

d. For each teacher, indicate whether his salary was paid in part from funds provided under Title I of the Elementary and Secondary Education Act and the amount of that partial payment.

e. For each teacher whose salary was paid in part from Title I funds, indicate whether he provided services to students eligible for Title I assistance.

f. For each teacher whose salary was paid in part from Title I funds:

1. Specify the subjects which he taught during the school year.

2. Specify the total number of teaching hours devoted to each subject during the school year.

3. Specify the total number of overtime hours for which he was paid from Title I funds and the services which he performed during those hours.

4. List the names of the students enrolled in each class which he taught in each subject.

6. For each school year from 1965-1970, specify the amount of money which the Bernalillo Municipal School District expended on textbooks in each school in the district.

a. For each school in the district, specify the amount of Title I funds expended for the purchase of textbooks.

b. For each school in the district, list the title and the number of copies of each title of the textbooks purchased with Title I funds.

c. For each school in the district, list thenames of the students receiving or using textbooks purchased with Title I funds.

7. For each school year from 1965-1970, specify the amount of money which the Bernalillo Municipal School District expended to purchase audio-visual materials in each school in the district.

a. For each school in the district, specify the amount of Title I funds expended for the purchase of audio-visual materials.

b. For each school in the district, list each purchase of audio-visual materials made from Title I funds.

c. For each school in the district, list the names of the students receiving the benefit of the audio-visual materials purchased with Title I funds.

7. For each school year from 1965-1970, specify the amount of money which the Bernalillo Municipal School District expended to purchase general instructional supplies in each school in the district.

a. For each school in the district, specify the amount of Title I funds expended for the purchase of general instructional supplies.

8. For each school year from 1965-1970, specify the amount of money which the Bernalillo Municipal School District expended for guidance and testing in each school in the district.

a. For each school in the district, specify the amount of Title I funds expended for guidance and testing.

9. For each school year from 1965-1970, specify the amount of money which the Bernalillo Municipal School District expended for instructional support supplies and services in each school in the district.

a. For each school in the district, specify the amount of Title I funds expended for the purchase of instructional support supplies and services.

10. Indicate the names of the persons employed as Registered Nurses by the Bernalillo Municipal School District for each school year from 1965-1970, the schools to which each was assigned, and the salary that each was paid.

a. For each nurse, indicate whether her salary was paid entirely from funds provided under Title I of the Elementary and Secondary Education Act.

b. For each nurse whose salary was paid entirely from Title I funds, did she provide services exclusively to students eligible for Title I assistance?

c. For each nurse whose salary was paid entirely from Title I funds, describe the specific duties which her employment entailed.

d. For each nurse, indicate whether her salary was paid in part from funds provided under Title I of the Elementary and Secondary Education Act and the amount of that partial payment.

e. For each nurse whose salary was paid in part from Title I funds, did she provide services to students eligible for Title I assistance?

f. For each nurse whose salary was paid in part from Title I funds, describe the specific duites which her employment entailed, including a description of the services which she provided students eligible for Title I assistance.

11. For each school year from 1965-1970, specify the amount of money which the Bernalillo Municipal School District expended for health support supplies and services in each school district.

a. For each school in the district, specify the amount of Title I funds expended for the purchase of health support supplies and services.

12. Indicate the names of the persons employed as Custodians by the Bernalillo Municipal School District for each school year from 1965-1970, the schools to which each was assigned, and the salary that each was paid.

a. For each custodian, indicate whether his salary was paid entirely from funds provided under Title I of the Elementary and Secondary Education Act.

b. For each custodian whose salary was paid entirely from Title I funds, did he provide services exclusively to students eligible for Title I assistance?

c. For each custodian whose salary was paid entirely from Title I funds, describe the specific duites which his employment entailed.

d. For each custodian, indicate whether his salary was paid in part from funds provided under Title I of the Elementary and Secondary Education Act and the amount of that partial payment.

e. For each custodian whose salary was paid in part from Title I funds, did he provide services to students eligible for Title I assistance.

f. For each custodian whose salary was paid in part from Title I funds, describe the specific duites which his employment entailed, including a description of the services which he provided students eligible for Title I assistance.

13. What expansion of school facilities occurred at each school in the Bernalillo Municipal School District in each separate school year from 1965-1970?

a. For each school and each school year, specify the amount of Title I funds expended for the expansion of facilities.

14. For each separate school year from 1965-1970, in the Bernalillo Municipal School District, did the schools which were designated as targets

for Title I funds have concentrations of children from low income families which were as high or higher than the percentage of such children for the district as a whole?

15. As to each school in the Bernalillo Municipal School District, state the enrollments by grades for each of the school years from 1965-1970, and, as to each grade, state the number of Indian students and the number of non-Indian students.

16. State the average class size for each school in the Bernalillo Municipal School District for school years 1965-1970.

17. Indicate in detail why the special education classes at the Roosevelt school are supplied with jewelry kits, bolo ties and other arts and crafts materials whereas the special education class at the Santo Domingo school is not.

18. Indicate whether the special education teachers at the Roosevelt school and the Bernalillo Junior High School have paid for instructional supplies from their own salaries.

19. Specify the total number of special education classes in the Bernalillo Municipal School District, the school at which each is located, the total enrollment of each class, and the number of Indian students in each class.

20. For the Bernalillo Municipal School District, indicate the average expenditure per child in each special education class in each school.

21. Indicate the average amount of money which the Bernalillo Municipal School District receives for each Indian child in a special education class under applicable federal and state laws.

22. For each school year from 1965-1970, state the names of the students which the Bernalillo Municipal School District designated as children "from low income families" for the purposes of Title I of the Elementary and Secondary Education Act, the school that each attended, and the grade level of each.

a. Specify which of those students were from the Santa Ana, Sandia, San Felipe, Cochiti, and Santo Domingo Pueblos.

b. Specify the percentage of such students at each school in the Bernalillo Municipal School District.

c. Specify which of those students were members of families receiving Aid For Dependent Children payments.

d. Specify which of those students were members of families whose income was less than $2000 per year.

e. Specify which of those students were members of families whose income was less than $3000 per year.

f. Specify which of those students were members of families whose income was greater than $3000 per year and who were not receiving Aid for Dependent Children payments.

g. Was a school survey conducted to determine which students were children "from low income families"?

h. If such a survey was conducted, does there exist a document embodying the results of that survey? If such a document exists, furnish the name and address of the person who has custody and control of that document and attach a copy thereof to your answer.

23. State the average per pupil expenditure from non-federal funds in the Bernalillo Municipal School District for school years 1964-65, and 1965-66. If the average per pupil expenditure from non-federal funds was lower in 1965-66 than in 1964-65, explain this decline in expenditures. Repeat this explanation for any subsequent school year in which there was a decline in expenditures from the previous school year.

24. For each school year from 1965-1970, state the names of the elementary school teachers in the Bernalillo Municipal School District whose salaries were paid from Title I funds and the school to which each was assigned. Specify the services which each provided students eligible for Title I assistance and the manner in which those services differed from services offered students ineligible for Title I assistance.

25. For each school year from 1965-1970, state the names of the secondary school teachers in the Bernalillo Municipal School District whose salaries were paid from Title I funds and the school to which each was assigned. Specify the services which each provided students eligible for Title I assistance and the manner in which those services differed from services offered students ineligible for Title I assistance.

26. For each school year from 1965-1970, state the names of the persons assigned to perform attendance activities in the Bernalillo Municipal School District whose salaries were paid from Title I funds and the school or schools to which each was assigned. Specify the services which each provided students eligible for Title I assistance and the manner in which those services differed from services offered students ineligible for Title I assistance.

27. For each school year from 1965-1970, in the Bernalillo Municipal School District, describe in detail the cultural enrichment program financed by Title I of the Elementary and Secondary Education Act and

indicate the cost of that program, the names of the participating students, and the school that each such student attended.

a. How were students chosen for participation in the cultural enrichment program? Were all students who enrolled in language arts and arts and crafts classes eligible?

b. Specify the names of the reading specialists, consultants, and area coordinators who participated in the cultural enrichment program.

c. Specify the services which the reading specialist offered the children participating in the cultural enrichment program and the manner in which those services differed from services offered to children who were not participating in the cultural enrichment program.

d. Specify the services which consultants offered children participating in the cultural enrichment program and the manner in which those services differed from services offered to children who were not participating in the cultural enrichment program.

e. Specify the services which the area coordinators offered the children participating in the cultural enrichment program and the manner in which those services differed from services offered to children who were not participating in the cultural enrichment program.

f. List each excursion to a place or event of interest and each field trip to a cultural center near Bernalillo undertaken under the cultural enrichment program, the names of the students who participated in each such excursion or trip, the school which each student attended, and the date of each such excursion trip.

g. For each school year from 1965-1970 list each excursion to a place or event of interest and each field trip to a cultural center near Bernalillo which was not paid for out of Title I funds, and the date of each such excursion trip.

h. For each school year from 1965-1970, did the Bernalillo Municipal School District conduct evaluations of the cultural enrichment program?

i. If the Bernalillo Municipal School District did conduct such evaluations, does there exist a document embodying the results of those evaluations? If such a document exists, furnish the name and address of the person who has custody and control of said document and attach a copy thereof to your answer.

j. Furnish the names and addresses of all parents involved in the trips or excursions undertaken pursuant to the cultural enrichment program.

k. Indicate the manner and dates on which information concerning the cultural enrichment program was disseminated.

l. List the names of all Indian students who participated in the cultural enrichment program.

28. For each school year from 1965-1970, in the Bernalillo Municipal School District, describe in detail the English reading program financed by Title I of the Elementary and Secondary Education Act and indicate the cost of that program, the names of the students who participated, and the school that each such student attended.

a. Specify the names of the reading teachers assigned to the English reading program, the services which they rendered students participating in the English reading program, and the manner in which those services differed from services offered to children who were not participating in the English reading program.

b. Specify the names of the language art directors assigned to the English reading program, the services which they rendered students participating in the English reading program, and manner in which those services differed from services offered to children who were not participating in the English reading program.

c. Specify the names of the language arts consultants assigned to the English reading program, the services which they rendered students participating in the English reading program, and the manner in which those services differed from services offered to children who were not participating in the English reading program.

d. List the names of all Indian students who participated in the English reading program.

e. What is the total number of hours of English language training received by each student, in each grade level, who participated in the English reading program?

f. What was the total number of hours of English language training received by each student, in each grade level, who did not participate in the English reading program?

g. List the titles of the "pleasurable reading matter" referred to in the Title I project application for each year from 1965-1970, of the Bernalillo Municipal School District and describe how it relates to the English reading program.

h. Was the daily reading practice aspect of the English reading program offered in addition to the regular English language classes? If so, how many additional hours of such reading practice did each participating child receive in each grade level?

i. List the names of Indian parents who were visited at home by reading teachers in order to discuss the progress of their children in the English reading program and the date of each such conference. Is it true that such visits were seldom welcomed by Indian parents?

j. For each school year from 1965-1970 did the Bernalillo Municipal School District conduct evaluations of the English reading program?

k. If the Bernalillo Municipal School District did conduct such evaluations, does there exist a document embodying the results of those evaluations? If such a document exists, furnish the name and address of the person who has custody and control of said document and attach a copy thereof to your answer.

l. Under the English reading program, list the names of the staff members who attended reading workshops, the dates of those workshops, their subject matter, and their relation to the English reading program.

m. What services did the Southwest Cooperative Educational Laboratory and the Educational Service Center provide in the English reading program?

n. List the names of the parents who attended the Open House sponsored by the Bernalillo Municipal School District in order to familiarize them with the English reading program. On what date was the Open House held?

o. Does there exist a handbook entitled "The Language Arts Center Handbook" which elaborates on the English reading program and services? If such a handbook exists, furnish the name and address of the person who has custody and control of said handbook and attach a copy thereof to your answer.

p. Does there exist a document entitled "Curriculum Guide" which discusses the standard of intended coverage in English classrooms by grade and level? If such a document exists, furnish the name and address of the person who has custody and control of said document and attach a copy thereof to your answer.

q. List the persons to whom "The Language Arts Center Handbook" and the "Curriculum Guide" were distributed and the dates of distribution.

r. List the issues of the Bernalillo High School Newspaper in which information on the English reading program was disseminated.

s. Did the personnel at the Language Arts Center prepare a pamphlet discussing current program involvement for the English reading program?

t. If such a pamphlet exists, furnish the name and address of the person who has custody and control of said pamphlet and attach a copy thereof to your answer.

u. List the names of the persons employed by the Language Arts Center, their salary, and their duties.

v. What services did participants in the English reading program receive that non-participating students did not receive?

29. For each school year from 1965-1970, in the Bernalillo Municipal School District, describe in detail the English as a second language program financed by Title I of the Elementary and Secondary Education Act and indicate the cost of that program, the names of the students who participated, and the school that each such student attended.

a. How were students chosen for participation in the English as a second language program? What percentage of the total number of students in the Bernalillo Municipal School District participated in the English as a second language program?

b. List the names of all Indian children who participated in the English as a second language program.

c. Specify the names of the teachers assigned to the English as a second language program, the services which they rendered students participating in the English as a second language program, and the manner in which those services differed from services offered to children who were not participating in the English as a second language program.

d. Specify the names of the consultants assigned to the English as a second language program, the services which they rendered students participating in the English as a second language program, and the manner in which those services differed from services offered to children who were not participating in the English as a second language program.

e. What was the total number of hours of English language training received by each student, in each grade level, who participated in the English as a second language program?

f. What was the total number of hours of English language training received by each student, in each grade level, who did not participate in the English as a second language program?

g. List the names of the language arts consultants who conducted classroom demonstrations under the English as a second language program, the dates upon which the demonstrations took place, and the names of the children who benefited from this service. Describe these demonstrations.

h. List the units of materials prepared by language arts consultants pursuant to the English as a second language program, the name of the person or persons who prepared those materials, and the specific classes and grade levels in which they were utilized.

i. List the in-service workshops in which language art consultants assisted, the dates of those workshops, and the names of the participating language art consultants. Describe each such workshop.

j. On what date was the inter-district teacher exchange program initiated pursuant to the English as a second language program? List the dates of each exchange of teachers, the names of the participating teachers, and the subjects that were observed.

k. What services did participants in the English as a second language program receive that non-participating students did not receive?

l. For each school year from 1965-1970, did the Bernalillo Municipal School District conduct evaluations of the English as a second language program?

m. If the Bernalillo Municipal School District did conduct such evaluations, does there exist a document embodying the results of those evaluations? If such a document exists, furnish the name and address of the person who has control and custody of said document and attach a copy thereof to your answer.

n. List the issues of the Bernalillo High School Newspaper in which information on the English as a second language program was disseminated.

o. List the names of the parents who attended the Open House sponsored by the Bernalillo Municipal School District in order to familiarize them with the English as a second language program. On what date was the Open House held?

30. For each school year from 1965-1970, in the Bernalillo Municipal School District, describe in detail the Physical Education program financed by Title I of the Elementary and Secondary Education Act and indicate the cost of that program, the names of the students who participated, and the school that each such student attended.

a. How were students chosen for participation in the Title I physical education program?

b. Was the Title I physical education program open to all pupils in each target school?

c. List the names of all Indian children who participated in the Title I physical education program.

d. Specify the names of the teachers assigned to the Title I physical education program, the services which they rendered students participating in the program, and the manner in which those services differed from services offered to children who were not participating in the Title I physical education program.

e. What was the total number of hours of physical education classes received by each student in each grade level who participated in the Title I physical education program?

f. What was the total number of hours of physical education classes received by each student in each grade level who did not participate in the Title I physical education program?

g. How was it determined that a physical education program under Title I was related to the special educational needs of disadvantaged children within the meaning of that Act?

h. Was the improvement of postural mechanics a purpose of the Title I physical education program? What does this mean?

i. Were inter-school games financed under the Title I physical education program?

j. List the instances and dates that information about the Title I physical education program was disseminated.

k. Specify the manner and the dates that parents were involved in the Title I physical education program.

31. For each school year from 1965-1970, in the Bernalillo Municipal School District, describe in detail the Music program financed by Title I

I of the Elementary and Secondary Education Act and indicate the cost of that program, the names of the students who participated, and the school that each such student attended.

a. How were students chosen for participation in the Title I music program?

b. Was the Title I music program open to all elementary students at the Roosevelt, Roosevelt Annes, Placitas and Algodones schools?

c. List the names of all Indian children who participated in the Title I music program.

d. Specify the names of the teachers assigned to the Title I music program, the services which they rendered students participating in the program, and the manner in which those services differed from services offered to children who were not participating in the Title I music program.

e. What was the total number of hours of music instruction received by each student in each grade level who participated in the Title I music program?

f. What was the total number of hours of music instruction received by each student in each grade level who did not participate in the Title I music program?

g. How was it determined that a music program under Title I was related to the special educational needs of disadvantaged children within the meaning of that Act?

h. Specify the dates that musical programs were presented by students for a parent audience as a part of the Title I music program.

32. For each school year from 1965-1970, in the Bernalillo Municipal School District, describe in detail the arts and crafts program financed by Title I of the Elementary and Secondary Education Act and indicate the cost of that program, the names of the students who participated, and the school that each such student attended.

a. How were students chosen for participation in the Title I arts and crafts program?

b. Was the Title I arts and crafts program open to all students in all classes of the Bernalillo Junior High School?

c. List the names of all Indian children who participated in the Title I arts and crafts program.

d. Specify the names of the teachers assigned to the Title I arts and crafts program, the services which they rendered students participating in the program, and the manner in which those services differed from services offered to children who were not participating in the Title I arts and crafts program.

e. What was the total number of hours of arts and crafts instruction received by each student in each grade level who participated in the Title I arts and crafts program?

f. What was the total number of hours of arts and crafts instruction received by each student in each grade level who did not participate in the Title I arts and crafts program?

g. How was it determined that an arts and crafts program under Title I was related to the special educational needs of disadvantaged children within the meaning of that Act? Describe the relationship between the needs of educationally disadvantaged children and the Title I arts and crafts program.

h. Was small muscle coordination and development an object of the Title I arts and crafts program? If small muscle coordination and development was an object of the program, describe the relationship between that object and the needs of educationally deprived children.

33. For each school year from 1965-1970, in the Bernalillo Municipal School District, describe in detail the attendance and family counseling program financed by Title I of the Elementary and Secondary Education Act and indicate the cost of that program and the schools at which it was in effect.

a. Was the Title I attendance and family counseling program open to all pupils with attendance problems in the target schools?

b. Were investigations of the high dropout and truancy rates undertaken under the Title I attendance and family counseling program?

c. If investigations of the high dropout and truancy rates were undertaken under the Title I attendance and family counseling program, does there exist a document embodying the results of these investigations? If such a document exists, furnish the name and address of the person with custody and control of said document and attach a copy thereof to your answer.

d. Specify the names of the counselors assigned to the Title I attendance and family counseling program, the services which they rendered students eligible for Title I assistance, and the manner in which those services differed from services offered to children who were not eligible for Title I assistance.

e. Specify the names of the attendance officers assigned to the Title I attendance and family counseling program, the services which they rendered students eligible for Title I assistance, and the manner in which those services differed from services offered to children who were not eligible for Title I assistance.

f. List the dates and the names of Indian parents who were visited in their homes under the Title I attendance and counseling program in order to get first-hand information on the needs of the children and to inform parents about Title I services.

g. Specify the dropout rate for the Bernalillo Municipal School District for each school year from 1965-1970.

h. Specify the truancy rate for the Bernalillo Municipal School District for each school year from 1965-1970.

i. What was the total number of hours of attendance and family counseling received by each student in each grade level who participated in the Title I attendance and family counseling program?

j. What was the total number of hours of attendance and family counseling received by each student in each grade level who did not participate in the Title I attendance and family counseling program?

34. For each school year from 1965-1970, in the Bernalillo Municipal School District, describe in detail the food service program financed by Title I of the Elementary and Secondary Education Act and indicate the cost of that program.

a. Indicate the names of all the students who received free meals pursuant to the Title I food services program.

b. Indicate the total number of free meals provided under Title I during each school year from 1965-1970.

c. How were children chosen for participation in the Title I food service program?

35. For each school year from 1965-1970, specify the name of the person employed by the Bernalillo Municipal School District as the Coordinator of Guidance Service and paid from funds provided under Title I of the Elementary and Secondary Education Act, the salary which this person was paid, and the schools at which said person provided educational services.

a. Were the services of the Coordinator of Guidance Service available to all personnel and students in the Bernalillo Municipal School District.

b. Were questionnaires filled out be twelfth grade students and by teachers in order to evaluate the guidance program?

c. If questionnaires were filled out by twelfth grade students and by teachers, furnish the name and address of the person who has custody and control over said questionnaires and attach copies thereof to your answer.

d. List all in-service educational workshops held under the Title I guidance program, the dates of these workshops, and the names of the teachers and counselors who participated.

e. List the issues of the Bernalillo High School Newspaper in which information on the Title I guidance program was disseminated.

36. For each school year from 1965-1970, in the Bernalillo Municipal School District, describe in detail the dental health program financed by Title I of the Elementary and Secondary Education Act and indicate the cost of that program and the schools at which it was in effect.

a. How were students chosen for participation in the Title I dental health program?

b. Was the Title I dental health program open to all the students in the target schools?

c. List the names of the pupils who received dental care pursuant to the Title I dental health program.

d. Specify the names of nurses and dentists assigned to the Title I dental health program and the manner in which the services which the offered students eligible for Title I assistance differed from dental services offered to students who were not eligible for Title I assistance.

37. For each school year from 1965-1970, in the Bernalillo Municipal School District, describe the medical health program financed by Title I of the Elementary and Secondary Education Act and indicate the cost of that program and the schools at which it was in effect.

a. How were students chosen for participation in the Title I medical health program?

b. Was the Title I medical health program open to all the students in the target schools?

c. List the names of the pupils who received medical care pursuant to the Title I medical health program.

d. Specify the names of nurses and doctors assigned to the Title I medical health program and the manner in which the services which they offered students eligible for Title I assistance differed from medical services offered to students who were not eligible for Title I assistance.

38. For each school year from 1965-1970, in the Bernalillo Municipal School District, describe in detail the elementary school library program financed by Title I of the Elementary and Secondary Education Act and indicate the cost of that program, the names of the students who participated, and the schools at which the program was in effect.

a. How were students chosen for participation in the Title I elementary school library program?

b. Was the Title I elementary school library program open to all students in the target schools?

c. Was theTitle I elementary school library program open to all students at the Roosevelt and Santo Domingo schools?

d. Specify the names of the librarians assigned to the Title I elementary school library program, the services which they rendered students participating in the program, and the manner in which those services differed from the services offered to students who were not participating in the program.

e. What was the total number of hours of library time allowed to each student in each grade level who participated in the Title I elementary school library program?

f. What was the total number of hours of library time allowed to each student in each grade level who did not participate in the Title I elementary school library program?

g. Were classes of children who were ineligible for Title I assistance assigned library periods under the Title I elementary school library program?

h. What were the library hours at the Santo Domingo school?

i. What were the library hours at the Roosevelt school and the Bernalillo Junior High School?

j. How many books were contained in the library at the Santo Domingo school?

k. How many books were contained in the library at the Roosevelt school?

l. How Many books were contained in the library at the Bernalillo Junior High School?

39. For each school year from 1965-1970, in the Bernalillo Municipal School District, describe in detail the function and activities of the Curriculum Materials Center, and indicate the costs of this program.

a. What amount of Title I funds was used to pay the costs of the Curriculum Materials Center?

b. Was an objective of the Curriculum Materials Center to bring the Bernalillo Municipal School system up to the Office of Education's quantitative standards for audio-visual equipment and teaching aids? If so, how is this related to the special educational needs of educationally deprived children within the meaning of Title I of the Elementary and Secondary Education Act?

c. Were services offered by the Curriculum Materials Center open to all students in the Bernalillo Municipal School District?

d. Did the Curriculum Materials Center distribute Title I equipment based on the number of eligible children for Title I assistance in each school building?

e. List each item of Title I equipment distributed by the Curriculum Materials Center, the cost of each item, the school to which each was sent, and the purpose for which each was to be employed.

f. List each item of non-Title I equipment distributed by the Curriculum Materials Center, the cost of each item, the school to which each was sent and the purposes for which each was to be employed.

g. List all Title I equipment transferred back to the Curriculum Materials Center, the cost of each item, and the school from which each was transferred.

h. Indicate the dates and the participants in in-service training programs provided by the Curriculum Materials Center in order to train teachers and substitute teachers in the operation of audio-visual equipment.

i. Was the salary of the Curriculum Materials Center Coordinator paid from funds provided under Title I of the Elementary and Secondary Education Act?

40. For each school year from 1965-1970, in the Bernalillo Municipal School District, list each program and employee salary which was paid for in whole or in part from Title I funds, but which was previously paid from other funding sources.

41. For each school year from 1965-1970, did the Bernalillo Municipal School District establish a Title I Advisory Committee to allow parents and community groups to participate in the Title I decision-making process?

a. Specify the dates on which the Title I Advisory Committee met.

b. List the names and addresses of the members of the Title I Advisory Committee.

c. Specify the manner in which the Title I Advisory Committee assisted the Bernalillo Municipal School District in determining the needs of educationally disadvantaged children.

d. How were the members of the Title I Advisory Committee chosen?

e. If the Bernalillo Municipal School District did not establish a Title I Advisory Committee, indicate how parents and community groups were involved in making decisions with regard to the Title I program. List the names of the parents and community groups involved, and the dates that they were consulted.

42. Has the Bernalillo Municipal School District undertaken an audit subsequent to the filing of this lawsuit? If the school district has undertaken such an audit, on what date will it be completed?

43. If the Bernalillo Municipal School District has undertaken and completed an audit subsequent to the filing of this lawsuit, does there exist a document embodying the results of that audit? If such a document exists, furnish the name and address of the person who has custody and control of said document, and attach a copy thereof to your answer.

HARVARD UNIVERSITY
CENTER FOR LAW AND EDUCATION

Mailing Address:

24 Garden Street
Cambridge, Massachusetts 02138
617-868-7600 x 4666

11 February 1970

The Honorable Senator Edward M. Kennedy
3214 New Senate Office Building
Washington, D.C. 20510

Dear Senator Kennedy:

I wish to bring to your attention an appalling situation in the Bernalillo school district in Sandoval County New Mexico, where poor Pueblo children are being discriminated against and deprived of statutory rights granted to them under Title I of the Elementary and Secondary Education Act of 1965.

During the week of February 2, 1970, I visited the Bernalillo school district at the request of the Coordinating Committee of the Santa Ana, Sandia, Santo Domingo, San Felipe and Cochiti Pueblos. These Pueblos have initiated a legal action against the Bernalillo school board and other parties in order to secure a quality education for Indian children, and the Center for Law and Education is assisting in this effort. I reviewed the project applications for Title I funds submitted by the school board for fiscal years 1966-67, 1967-68, 1968-69 and 1969-70. After visiting five of the seven schools in the Bernalillo district, accompanied by members of the Pueblo Education Committee, I concluded that the local school authorities were disregarding the Title I regulations, that the project applications did not reflect accurately the actual allocation of Title I funds, and that most of the funds were being expended unlawfully. Specifically, I reached the following conclusions:

1. Librarians, teachers, nurses, and counselors are paid from Title I funds even though they provide services to students who are not eligible for Title I assistance.

2. Poor Indian students do not receive remedial reading or language reinforcement services even though such "promises" provide the basis for the district's applications for Title I funds. Teachers at the nearly all Indian Santo Domingo school informed me that, with the exception of one third grade class, no students receive English instruction beyond that which all other students in the district receive.

3. Equipment purchased from Title I funds for poor children has been illegally made available to entire school populations. Indeed, there is evidence that equipment purchased for the Santo Domingo school (98% Indian), including tape recorders, television sets, phonographs, and projectors, has been illegally and clandestinely transferred to other schools in the district, where they are used, at least in part, by ineligible students.

4. Cafeteria facilities, textbooks, and special education classes at the Santo Domingo school are not comparable to those provided in other schools in the district as Title I regulations require.

5. The Bernalillo school board has not taken any steps to establish a parent advisory committee or to establish any mechanism for effective community and parental participation in the Title I decision-making process, as the Title I guidelines and regulations require. In terms of the hiring of teacher aides, the appointment of new members to the school board, and the selection of subjects for inclusion in the curriculum, the wishes of the Pueblo communities have been ignored.

6. Some of the programs financed by Title I are unrelated to the needs of poor Indian children, and consistently have been opposed by the Pueblo communities. For example, arts and crafts is paid for out of Title I funds on the theory that it will increase "small muscle " coordination. Such an expenditure is outrageous in view of the far more pressing need, recognized by Pueblo parents if not by the school board, to provide poor Indian children with English language skills.

7. In general, Title I and Johnson-O'Malley Act funds are treated as non-catergorical aid which the board may spend as it deems appropriate.

In terms of the immediate exigencies of the situation, an audit of the Bernalillo school district by the HEW Audit Agency is absolutely essential to the preservation of the rights of the poor Indian children in the district. Since the school board's budgets and Title I applications often are inaccurate and misleading, and since they do not provide a school by school breakdown of expenditures, a detailed audit is the only viable approach for delineating the precise nature and extent of the Title I violations. It would be unconscionable to place the severe financial burden of a private audit on the Pueblos. Therefore, I respectfully request that you urge the appropriate officials in the Department of Health, Education, and Welfare, including Mr. Mallen of the HEW Audit Agency, Secretary Finch, and Commissioner Allen to undertake an audit. I am hopeful that in view of your membership on the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, and the continuing interest in the welfare of Indian citizens which you have demonstrated, that these officials will respond immediately to your request.

Thank you for your kind attention.

Sincerely,

Mark G. Yudof
Title I Coordinator

MGY:mfr